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REPORTS

OF

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ARGUED AND DETERMINED

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IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

BY WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, that on the twenty-first day of March, in the forty-fifth year of the Independence of the United States of America, WILLIAM MUNFORD, of the said District, hath deposited in this office the title of a book, the right whereof he claims as Author, in the words following, to wit:

**“Reports of Cases argued and determined in the Supreme Court of
“ Appeals of Virginia. By William Munford. Vol. VI.”**

In conformity to the Act of the Congress of the United States, entitled “an Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”

R'D. JEFFRIES,
Clerk of the District of Virginia.

TO THE READER.

TO prevent mistakes by the student or practitioner, it is proper to mention that, in consequence of an Act of the General Assembly, passed March 5th, 1821, entitled, "an Act concerning the jurisdiction of the Superior Courts of Chancery, and for other purposes," (see Acts of 1820, c. 31, p. 31.) the point determined in the case of *Winn v. Bowles*, (p. 23—25, of this volume,) is no longer law; and that, by two other Acts of the same session, (See c. 29. sect. 6. p. 30, and c. 34. sect. 1, p. 34,) it is declared, that *more fines than one* may legally be imposed on a sheriff or other officer for failing to return *one* execution; so that the case of *Tomkies' ex'or v. Downman*, (p. 557—573,) is not authority as to cases occurring since the 28th day of February 1821.

¶ The following opinion of the Court, delivered by Judge ROANE, in the case of the *Attorney General v. Broaddus and wife*, February 17th 1818, was accidentally omitted in it's proper place.

Attorney General against Broaddus and Wife.

THIS is an information filed by the Attorney General, on behalf of the Commonwealth, against *Andrew Broaddus* and *Jane C.* his wife, in the Court of Chancery, for the District of Richmond. It is founded upon the written information of *Thomas Price, Jr.* and *John M. Shepard* therewith exhibited. The information charges that the defendants intermarried together on the 29th of December 1815; the female defendant being the sister of a second wife of the other defendant, then lately deceased, and the widow of one of his nephews; and that these facts were well known to the parties, at the time of their intermarriage. It prays that the

said defendants may answer the allegations thereof; that the Court would decree the nullity of the said marriage, and make such further decree in the premises, as the act on which it is founded (1 *Rev. Code*, ch. 101. p. 195. §. 13.) requires, as may be adapted to the nature of the case, and as a regard for the laws and public morals may demand.

The defendants filed a plea in bar of the said information;—in which, not admitting the truth of any of the facts stated therein, they say, that, by the 8th article of the bill of rights, it is declared, “that in all capital or criminal prosecutions, a man hath a right “to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his “favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; “nor can he be compelled to give evidence against himself; that no “man be deprived of his liberty, except by the law of the land, or “the judgment of his peers:”—that, by an act passed on the 5th December 1785, (1 *Rev. Code*, ch. 15. p. 18.) the legislature expressed its meaning of this article of the bill of rights by enacting “that no freeman shall be taken or imprisoned, or be dis-seised of “his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor shall the Commonwealth “pass upon him, nor condemn him, but by the lawful judgment of “his peers, or by the laws of the land:” that they are advised that an act which is contrary to, or inconsistent with, the said bill of rights, or any part of it, is unconstitutional, void, and of none effect; that the said information is to all intents and purposes a criminal prosecution, founded upon the act referred to therein; and that the said act, so far as it provides that any persons who shall contract marriage contrary thereto, shall be separated by the definitive sentence of the Court of Chancery, and that the attorney general shall exhibit a bill against them, which they shall be compelled to answer upon oath, and upon such bill, answer, and the *depositions* of witnesses, the said Court may proceed to give judgment, and declare the nullity of the marriage, and, moreover, may punish the parties by fine, and if it sees cause, may compel them to give bond with sufficient security, that they will not cohabit thereafter, provided that the said fine shall be assessed by a jury,—is a penal statute, authorising a criminal prosecution, in the mode therein prescribed, is inconsistent with the said article of the bill of rights, and is therefore unconstitutional, void, and of none effect; and, therefore, does not vest the said Court of Chancery with any lawful jurisdiction to hear and determine the matters in the said information contained: and, therefore, they demand judgment whether they ought to give any further or other answer to the same.

The cause coming on to be heard in the said Court, upon the said plea, which it was agreed might be considered as a demurrer, the court pronounced a decree, in which, declaring, in substance,

that, being of opinion that, if this be a criminal prosecution, that Court should not entertain it; that the act of the parties on which it was founded being a crime, and a prosecution for it, consequently, a criminal prosecution, "it was not competent to the legislature to confer jurisdiction thereof upon that Court, for the reasons assigned in the demurrer; and therefore considering so much of the act in question as contrary to the bill of rights, and, for that reason, void," decreed that the information should be dismissed.

From that decree an appeal was allowed, on the motion of the attorney general, to this Court.

While this Court is not prepared to assert the broad proposition that the legislature has no power, under any circumstance, to confer on the Court of Chancery, cognizance of a criminal prosecution; all the constitutional provisions in favour of jury trial, *viva voce* examination of witnesses, and exemption from self-accusation, being observed; it has no hesitation in saying that the proceeding before us is a criminal prosecution.

The information charges, that a crime has been committed, and prays the Court to decree the nullity of the marriage; which presupposes, and can only be founded upon, the previous judgment of the Court, that the parties are guilty of the crime imputed to them. It not only prays that the Court should *decide* whether they be guilty or not, but requires it to inflict the consequent punishment upon them.

The act of the parties now in question, although it offends highly against the laws and public morals of the country, inflicts no private injury upon any individual. It is therefore to be considered entirely as a public wrong, in contradistinction to one involving, also, a civil injury; and it follows that a prosecution therefor, is, emphatically, a public or criminal prosecution, and is not, in any sense, a civil proceeding.

This prosecution does not lose that character from the preventive duty assigned to the Court, of restraining the future intercourse of the parties. Although that power properly belongs to a civil and a Chancery Court, and, standing singly, might denote a civil and not a criminal proceeding, it cannot have that effect in this case, in which it is not a distinct and independent provision, but is merely an incident to the main object of the prosecution.

Nor can this inference result from depriving the defendants, by adopting the modes of proceeding in a Court of Equity, of the right of jury trial, confrontation with accusers and witnesses, and exemption from self-accusation, which are high privileges secured to every citizen by the bill of rights. They rather show an attempt to invade and elude those important provisions, by throwing an indictment into the form of a bill in equity. These great rights, so essential to the security of every citizen, would rest upon a slender basis indeed, could they be annulled by changing either the *forum* of controversy or the forms of proceeding.

On these grounds, the Court is clearly and unanimously of opinion, that the information in question is essentially, a criminal prosecution; and, as this Court has no jurisdiction in criminal cases, the appeal must be dismissed.

This disposition of the case will, perhaps, make it improper for the Court to pass any opinion upon its merits, further than is inferable from what is already said, nor is it probably regular to say any thing in relation to a crime, which is understood to be a growing one in this country, and strikes deeply at the happiness and well-being of society. It rests with the legislature, in their wisdom, to supply further and other provisions, for the purpose of preventing and suppressing it in future.

TABLE OF CASES REPORTED

IN THIS VOLUME.

This Table is so arranged, that the cases may be found, as well by the names of the appellees or defendants in error, as of the appellants or plaintiffs. The letter "v" follows the latter; the word "and" the former.

A.

	PAGE		PAGE
Abraham & others v. Matthews	159	Bell's adm'r and Cosby's ex'ors	282, 283
Alexander's heirs v. Coleman		Belt and wife and Carrington's	
and wife	328, 352	ex'ors	374, 377
Allen v. Bird and others	108, 110	Bennet v. Hardaway adm'r of	
Allen and Bumgardner & others	439, 447	Jones	125, 132
Anderson's adm'r v. Davies's		Beverleys v. Miller	99, 104
adm'r and others	484, 486	Bird & others and Allen	108, 110
Arbuckle and McClung	315, 316	Blakey v. Newby's adm'r's	64, 71
Armstrong and wife v. Hick-		Blankenbeker v. Blankenbek-	
man	287, 301	er and others	427, 428
Arnold v. Hickman	15, 18	Bogges v. Bogges	486, 487
Arnolds v. Jacksons	106, 107	Bolling v. Robertson and wife	220, 227
Atkinsons and Colquhoun	550, 557	Booth and Banks's ex'or and	
		others	385, 387
		Bowen and Preston	271, 277
		Bowie and others and William-	
		son and others	176, 180
		Bowles and Winn	23, 25
		Boyd and wife v. Hamilton's	
		heirs	459, 462
		Boyd ex'or of Hoskins v. Kauf-	
		mans	45, 47
		Bragg and others v. Murray	32
		Bray v. Dudgeon	132, 133
		Britton v. Williams's devisees	453, 454
		Broadus and wife and Attor-	
		ney General	116, 117
		Bromley's adm'r v. Harrison	184, 185
		Brooke v. Barton	306, 307
		Brooks and wife and M'Rae's	
		ex'ors	157, 159
		Brown's adm'r v. Griffiths	450, 452
		Brown v. Ross	391, 393
		Buck and others and Dunbar	34, 36
		Bumgardner & others v. Allen	439, 447

B.

Backus v. Taylor	488, 490
Bacon & Co. and Pate	219, 220
Bagby and Guerrant	160, 163
Baird and Baker and Ellis	456, 457
Baird and M'Niel and Turner	316, 318
Baker v. Glass	212, 218
Banister and wife v. M'Kenzie	447, 448
Bank of Virginia v. Ward	166, 169
Banks's ex'or & others v. Booth	385, 387
Banks's ex'or and others and	
Mountjoy & Triplett	387, 389
Barrett and Ruffners	207, 209
Bartlett & others and Weeden	123, 125
Barton and Brooke	306, 307
Baskerville and others and	
Stott and others	20, 23
Baylors & others and Pollard	433, 439

C.		E.	
	PAGE		PAGE
Cabell's ex'ors v. Megginson's adm'rs	202, 207	Early v. Owen	319, 320
Camm and wife and Warwick and wife and Norvell	233, 245	Elliott and Parker	587, 589
Carlton and wife and Cropper	277, 280	Ellis v. Baird and Baker	456, 457
Carrington's ex'ors v. Belt and wife	374, 377	Ellison and other v. Woody	368, 373
Carter and Galt and Garland	245, 250	Ervine v. Dotton	231, 232
Carter (Doe lessee of) and Jones	105	Erwin v. Vint	267, 271
Carter's adm'x and Wormley's ex'or	120, 123	Esbridge and Dimmett and others	308, 311
Chamberlaine and others v. Marsh's adm'r	283, 287	Evans and Thomson & O'Neal	397
Chamblis's adm'x and heirs and Wilders	432, 433	F.	
Chew ex'or of Wormeley v. Moffett and wife	120, 123	Ferguson v. Franklins	305, 306
Christian's devisee v. Christians and others	534, 541	Findlay v. Smith and wife and others	134, 155
Cocke adm'r of Bromley v. Harrison	184, 185	Fitzhugh and Grinnan v. Jones	83, 87
Cocke, Crawford & Co. and Janier, Shelton & Cocke	580, 581	Fleet v. Hawkins	188, 191
Cocke v. Upshaw	464, 465	Flournoy and Woody	506, 510
Cole and Henderson and Paradise's adm'rs	218, 219	Fox and Vowles v. Mountjoy ex'or of Edwards	36, 37
Coleman and wife and Alexander's heirs	328, 352	Franklins and Ferguson	305, 306
Colemans v. Holliday & others	47, 61	Franklin and Snelson & Co.	210, 212
Colquhoun v. Atkinsons	550, 557	Fuqua and wife and Liggon	281, 282
Commonwealth and Mann	452, 453	G.	
Cooper and Smith	401, 405	Galt and Garland v. Carter	245, 250
Cordle's adm'r v. Cordle's ex'or	455, 466	Gatewood and wife and Sutton	398, 399
Cosby's exors v. Bell's adm'x	282, 283	Gatewood and Taliaferro	320, 328
Crabbin's guardian and Stewart	280	Gee v. Hamilton and wife	32, 33
Cropper v. Carlton and wife	277, 280	Givens and Reynolds v. Manns	191, 202
Curtis v. Lunn ex'or of Jones	42, 45	Glass and Baker	212, 218
D.		Gosden and wife v. Tucker's heirs	1, 3
Daniel and wife v. Maclins	61, 64	Grant v. Hover	13, 15
Davies's adm'r and Anderson's adm'r	484, 486	Graves and Timberlake and wife	174, 175
Deford v. Hayes	390, 391	Greenhow's adm'x and heirs v. Harris and others	472, 484
Depriest and Robertson	469, 470	Greenlee and See	303, 304
Dickenson and others v. Holloway	422, 425	Gregory v. Jacksons	25, 27
Dimmett and others v. Eskridge	308, 311	Greshams v. Gresham and others	187, 188
Dotton and Ervine	231, 232	Griffiths and Brown's adm'r	450, 452
Douglass and Spotswood	312, 313	Guerrant v. Bagby	160, 163
Downman and Tomkies' ex'or	557, 573	H.	
Dudgeon and Bray	132, 133	Hackley and Johnston	448, 450
Dunbar v. Buck and others	34, 36	Hamilton's heirs and Boyd and wife	459, 462
Dunbar and Shumate	430, 431	Hamilton and wife and Gee	32, 33
Duval's ex'or v. Trent's devisees	29, 31	Hardaway adm'r of Jones and Bennett	125, 132
		Harper v. Smith	389, 390
		Harris and others and Greenhow's adm'x and heirs	472, 484
		Harris v. Harris	367, 368

	PAGE
Harris and M'Alexander	465, 469
Harrison and Cocke adm'r of Bromley	184, 185
Harrison and Lane	573, 580
Harrison and Rucker	181, 184
Harwell and Lanier	79, 81
Hawkins and Fleet	188, 191
Hayes and Deford	390, 391
Haymond and others and Horton and others	399, 401
Hickman and Armstrong and wife	287, 301
Hickman and Arnold	15, 18
Higgenbotham and Spotswood	313, 315
Higgins and Jolliffe	3, 6
Hill and wife and Lynch and wife	114, 116
Hodgson and others and the President and Professors of Wm. and Mary College	163, 165
Holladay and others and Coleman	47, 61
Holliday & Welch and Rootes	251, 261
Holloway and Dickenson and others	422, 425
Hopkins and Watson v. Ward and others	38, 41
Horton and others v. Haymond and others	399, 401
Hover and Grant	13, 15
Hubard's representatives and Jones	261, 264
Hudsons v. Hudson's adm'r and others	352, 357
Hunt and others v. M'Rea	454, 455
J.	
Jacksons and Arnolds	106, 107
Jacksons and Gregory	25, 27
Jackson v. Webster	462, 464
James v. M'Williams and wife	301, 302
Johnson and Ward	6, 9
Johnston v. Hackley	448, 450
Jolliffe v. Higgins	3, 6
Jones v. Doe lessee of Carter	105
Jones and Fitzhugh and Grinnan	83, 87
Jones v. Hubbard's representatives	261, 264
Jones v. Pilcher's devisees	425, 427

K.

Kaufmans and Boyd ex'or of Hoskins	45, 47
Keys v. M'Patridge	18, 20
Kinchaloe and Neply	529, 531
King and Mann	428, 430
King and Taylor	358, 367
Kinney's ex'ors and Prior and others	510, 514

L.

	PAGE
Lane v. Harrison	573, 580
Lanier, Shelton and Cocke v. Cocke, Crawford & Co.	580, 581
Lanier v. Harwell	79, 81
Larue and Shepherd	529, 531
Laverty & Gantley and Walker	487, 488
Legg and Peggy and Mary	229, 231
Lewis and others and Singleton	397, 398
Lewis and others v. Thornton and wife	87, 98
Liggon v. Fuqua and wife	281, 282
Logwood and West's ex'or	491, 506
Long and Waller	71, 79
Lorsaine and others and Scott wife and Claiborne	117, 119
Lunn ex'or of Jones and Curtis	42, 45
Lynch and wife v. Hill and wife	114, 116

M.

M'Alexander v. Harris	465, 469
M'Clung v. Arbuckle	315, 316
M'Patridge and Keys	18, 20
Machir's ex'or v. Machir's devisees	265, 267
M'Kenzie and Banister and wife	447, 448
Maclins and Daniel and wife	61, 64
M'Niel and Turner v. Baird	316, 318
M'Rae's ex'ors v. Brooks and wife	157, 159
M'Rea and Hunt and others	454, 455
M'Williams and wife and James	301, 302
Mann v. the Commonwealth	452, 453
Manns and Givens and Reynolds	191, 192
Mann v. King	428, 430
Marsh's adm'r and Chamberlaine and others	283, 287
Matthews and Abraham and others	159
Mayo v. Tomkies	520, 528
Meggins's adm'r's and Campbell's ex'ors	202, 207
Miller and Beverleys	99, 104
Miller's ex'or and Spindle's adm'r	170, 173
Moffett and wife and Chew ex'or of Wormeley	120, 123
Morgan's ex'ors and Selby and wife	156, 157
Mountjoy ex'or of Edwards and Fox and Vowles	36, 37
Mountjoy and Triplett v. Banks's ex'or & devisees	387, 389
Munford v. Rice and others	81, 83
Murray and Bragg and others	32

	PAGE		PAGE
Muse ex'or of Hefnerman v. Vidal	27, 29	Smith and wife and others and Findlay	134, 135
N.		Smith and Harper	389, 390
Neply v. Kinchloe	529, 531	Smith v. Smith's adm'r	582, 584
Newby's adm'r's and Blakey	64, 71	Smith v. Pearce	565, 587
Noland v. Seckright lessee of Cromwell	185, 187	Snelson & Co. v. Franklin	210, 213
Norvell v. Canam and wife and Warwick and wife	233, 245	Solomon and others and South	12, 13
O.		South v. Solomon and others	12, 13
Owen and Early	319, 320	Spindle's adm'r v. Miller's ex'ors	170, 173
P.		Spotts and Pate	394, 397
Paradise's adm'r's v. Cole and Henderson	218, 219	Spotswood v. Douglas	312, 313
Parker v. Elliott	587, 589	Spotswood v. Higgenbotham	313, 315
Pate v. Bacon & Co.	219, 220	Stewart v. Crabbin's guardian	280
Pate v. Spotts	394, 397	Stone v. Ware and Smith	541, 550
Pearce and Smith	585, 587	Stott and others v. Baskerville and others	20, 23
Peggy and Mary v. Legg	229, 231	Street v. St. Chair	457, 458
Pendleton's adm'r's v. Stuart and McCoull	377, 384	Stuart and McCoull and Pendleton's adm'r's	377, 384
Pitcher's devisees and Jones	425, 427	Sutton v. Gatewood and wife	398, 399
Poindexter v. Waddy	418, 422	T.	
Pollards v. Baylors and others	433, 439	Taliaferro v. Gatewood	320, 328
Preston v. Bowen	271, 277	Taylor and Backus	488, 490
Prior and others v. Kinney's ex'ors	510, 514	Taylor v. King	358, 367
R.		Thompson's adm'r v. Thompson's ex'or	514, 519
Rice and others and Munford	81, 83	Thomson and O'Neal v. Evans	397
Robertson and wife and Bohling	220, 227	Thornton and wife and Lewis and others	87, 98
Robertson v. Depriest	469, 470	Timberlake & wife v. Graves	174, 175
Rootes v. Holliday and Welch	251, 261	Tomkies' ex'or v. Downman	557, 573
Ross and Brown	391, 393	Tomkies and Mayo	520, 528
Rucker v. Harrison	181, 184	Trent's devisees and Duval's ex'or	29, 31
Ruffners v. Barrett	207, 209	Tucker's heirs and Gorden and wife	1, 3
S.		Tune and Self's adm'r	470, 472
St. Clair and Street	457, 458	U.	
Scott and wife and Claiborne v. Loraine and others	117, 119	Upshaw and Cocke	464, 465
See v. Greenlee	303, 304	V.	
Seckright lessee of Cromwell and Noland	185, 187	Vidal and Muse ex'or of Hefnerman	27, 29
Selby and wife v. Morgan's ex'ors	156, 157	Vint and Erwin	267, 271
Self's adm'r v. Tune	470, 472	W.	
Shaver v. White and Dougherty	110, 114	Waddy and Poindexter	418, 422
Shepherd v. Larue	529, 531	Walker v. Lavery and Gantley	487, 488
Shumate v. Dunbar	430, 431	Waller v. Long	71, 79
Singleton v. Lewis	397, 398	Ward and the Bank of Virginia	166, 169
Smith v. Cooper	401, 405	Ward v. Johnson	6, 9
		Ward and others and Hopkins and Watson	38, 41

CASES CITED.

xi

	PAGE		PAGE
Ware and Smith <i>and</i> Stone	341, 330	Withers's ex'x v. Withers's	
Webster and Jackson	462, 464	ex'or	10, 12
Weeden v. Bartlett and others	123, 125	Woody v. Flournoy	506, 510
Wells v. Washington's adm'r	532, 533	Woodson's heirs <i>and</i> Wood-	
West's ex'or v. Logwood	491, 506	ward	227, 229
White and Dougherty <i>and</i>		Woodward v. Woodson's	
Shaver	110, 114	heirs	227, 229
Wilders v. Chambliss's adm'x		Woody and others <i>and</i> Ellison	
and heirs	432, 433	and others	368, 375
Williams's devisees <i>and</i> Britton	433, 434	Wormeley's ex'or v. Carter's	
Williamson and others v. Bowie		adm'x	120, 125
and others	176, 180		
Wm. and Mary College v.			
Hodgson and others	163, 165		
Winn v. Bowles	23, 25		

Z.

Zane's devisees v. Zane 406, 417

TABLE OF CASES CITED.

AMERICAN AUTHORITIES.

This Table is so arranged, that the cases may be found, as well by the names of the appellees or defendants, as of the appellants or plaintiffs in error. The letter "v" follows the latter; the word "and" the former. The cases in *italics*, are such as have not been reported.

	PAGE		PAGE
Alderson v. Biggers & others,		Baird <i>and</i> Lee, 4 <i>H. & M.</i>	453. 418
4 <i>H. & M.</i> 470.	409, 504	Baird v. Rice, 1 <i>Call</i> , 18	7, 8
Abbidge v. Giles, 3 <i>H. & M.</i>		Ball's devisees v. Ball's ex'ors &	
136.	334	widow, 3 <i>Munf.</i> 279.	333, 340
Alexander v. Greenup, 1 <i>Munf.</i>			341, 343, 348
134.	233, 235, 238	Banister's ex'ors <i>and</i> White, Whit-	
Allen v. Farham, 5 <i>Munf.</i> 457.	174	tle & Co. 1 <i>Wash.</i> 168.	30
Ambler v. Wyld, 2 <i>Wash.</i> 36.	291	Baring v. Reeder, 1 <i>H. & M.</i> 162.	76
Anderson <i>and</i> Fitzhugh, 2 <i>H. & M.</i>		Barksdale <i>and</i> Garth's ex'or, 5	
289.	352	<i>Munf.</i> 101.	357
Ashtor <i>and</i> Moore, 3 <i>H. & M.</i>		Baylor <i>and</i> Hansbrough, 2 <i>Munf.</i>	
232.	259	36.	479, 482
Ashtor v. Nicholas, 2 <i>Munf.</i> 31.		Baylor <i>and</i> Pollard, 4 <i>H. & M.</i>	
498, 500, 502, 569		223.	73, 367, 483
Austin v. Richardson, 3 <i>Call</i> , 201-		Beale <i>and</i> Shermer, 1 <i>Wash.</i> 11-14.	76
206.	277	Bedinger v. the Commonwealth,	
		3 <i>Call.</i> 461-475.	117
B.		Bell <i>and</i> Mackey, 2 <i>Munf.</i> 523.	328
Bacon's legatees <i>and</i> ex'ors <i>and</i>		Bentley <i>and</i> Mayo,	381
Lewis's ex'or, 3 <i>H. & M.</i> 89.	450	Berrymen <i>and</i> Gray's adm'x.	
Bacon & Co. <i>and</i> Pate, 6 <i>Munf.</i>		4 <i>Munf.</i> 183-4.	187
219.	588	Beverleys v. Miller, 4 <i>H. & M.</i>	
Baird v. Blagrove, 1 <i>Wash.</i> 170.	15	415-423.	99
		Bibb v. Cauthorne, 1 <i>Wash.</i> 91.	404

	PAGE		PAGE
Biggers and others and Alder- son, 4 <i>H. & M.</i> 470.	499, 504	Clay v. White, 1 <i>Munf.</i> 162.	25, 26 303
Blagrove and Baird, 1 <i>Wash.</i> 170.	15	Clay v. Williams, 2 <i>Munf.</i> 105.	267
Blakey and Newby's adm'r's, 3 <i>H. & M.</i> 57-66.	64, 65, 66 67, 69	Cochran v. Street, 1 <i>Wash.</i> 79.	291
Boyd and Swepson v. Stainbach and others, 5 <i>Munf.</i> 305.	583	Cole v. Claiborne, 1 <i>Wash.</i> 262.	372
Branch v. Burnley, 1 <i>Call.</i> 147.		Colston and Long, 1 <i>H. & M.</i> 115.	76
291, 292, 496, 500, 504, 564, 570		Commonwealth and Bedinger, 3 <i>Cal.</i> 461-475.	117
Bray and Dunn and wife, 1 <i>Call.</i> 338.	174	Commonwealth and Fairfax, 4 <i>H.</i> & <i>M.</i> 208.	82
Brewer v. Opie, 1 <i>Call.</i> 214.	323	Cooke v. Simms, 2 <i>Call.</i> 39.	506, 509
Brock and Harrison, 1 <i>Munf.</i> 22.	17	Crenshaw's ex'ors and Foster and wife, 3 <i>Munf.</i> 514.	29
Brock and Robinson, 1 <i>H. & M.</i> 212.	583, 584	Cromwell and Noland, 4 <i>Munf.</i> 155.	21, 22, 233, 241, 499, 502
Brooks and wife and M'Rae's ex'or, 6 <i>Munf.</i> 157.	267	Croughton v. Duval, 3 <i>Call.</i> 69.	7, 9
Brown and Johnson, 3 <i>Call.</i> 259, 268.	241	Crump and Macon, 1 <i>Call.</i> 575.	488
Bullitt's ex'ors v. Winston's, 1 <i>Munf.</i> 269.	183	Cunningham and Kincaid, 2 <i>Munf.</i> 1.	498, 569
Bullock v. Goodall, 3 <i>Call.</i> 44. 564, 565, 566, 569, 570, 572		Cutchin v. Wilkinson, 1 <i>Call.</i> 1-6.	132
Bullock v. Irvine's adm'r's, 4 <i>Munf.</i> 450.	245	D.	
Burnley and Branch, 1 <i>Call.</i> 147. 291, 292, 496, 500, 504, 564, 570		Dandridge v. Harris, 1 <i>Wash.</i> 320.	217
Burrow and Hill, 3 <i>Cal.</i> 342.	60	Davis and Mackey, 2 <i>Wash.</i> 219.	299
Buster's ex'or v. Wallace, 4 <i>H. & M.</i> 82.	488	Davis and wife and Reno's ex'ors, 4 <i>H. & M.</i> 283.	371, 372
C.		Day v. Pickett, 4 <i>Munf.</i> 104.	531
Call ex'or of Means and Graham, 5 <i>Munf.</i> 396.	215, 217	Deans v. Scriba, 2 <i>Call.</i> 415.	390
Calloway and Wilcox, 1 <i>Wash.</i> 38-42.	233, 234	DeLima v. Glassel's adm'r, 4 <i>H. &</i> <i>M.</i> 369.	498, 499
Camm and wife and Norvell, 3 <i>Munf.</i> 257.	21, 22, 233, 234 235	Dick and Terrel, 1 <i>Call.</i> 546. 496, 498, 499, 500, 504, 568	
Campbell and Price, 2 <i>Call.</i> 110.	73, 482	Dickenson and others v. Holloway, 6 <i>Munf.</i> 422.	427
Cauthorne and Bibb, 1 <i>Wash.</i> 91.	405	Donald v. Nash.	329, 330
Chamberlayne and Higginbotham, 4 <i>Munf.</i> 547.	390	Donald & Co. and Totty's ex'or, 4 <i>Munf.</i> 430.	219, 580
Chandler's ex'x v. Neal's ex'ors, 2 <i>H. & M.</i> 124.	450	Dorr v. Munsel, 13 <i>Johnson's N. F.</i> rep 430.	366
Chaney v. Saunders, 3 <i>Munf.</i> 51.	130	Downman v. Downman's ex'or, 1 <i>Wash.</i> 28.	381
Chapmans v. Chapman, 1 <i>Munf.</i> 398.	68	Dunbar and Hollingworths, 5 <i>Munf.</i> 199.	277
Cheatwood v. Mayo, 5 <i>Munf.</i> 16.	467	Duncan and Turnbull and Fisher's ex'or, 1 <i>H. & M.</i> 563.	277
Chew ex'or of Wormley v. Mof- fett, 6 <i>Munf.</i> 120.	361	Dunlop, Pollock & Co. and Scott & Co. 2 <i>Munf.</i> 349.	219, 580
Chichester's ex'x v. Vase's adm'r, 1 <i>Munf.</i> 98.	68	Dunn and wife v. Bray, 1 <i>Call.</i> 338.	174
Claiborne and Cole, 1 <i>Wash.</i> 262.		Duval and Croughton, 3 <i>Call.</i> 69.	7, 9
Clay v. Ransome, 1 <i>Munf.</i> 454.	372 383	Duvals v. Ross, 2 <i>Munf.</i> 290. 498, 500, 501, 502, 504	
		E.	
		Eldridge v. Fisher, 1 <i>H. & M.</i> 559.	174

	PAGE
Eppes v. Randolph, 2 <i>Call</i> , 184.	258
Eppes and Royall, 2 <i>Munf.</i> 479.	174
F.	
Fairfax v. the Commonwealth, 4 <i>H. & M.</i> 208.	82
Fairfax's devisee and Hunter, 1 <i>Munf.</i> 218-238.	187
Fall v. Overseers of the Poor, 3 <i>Munf.</i> 495	453
Fenwick v. M'Murdo and Fisher, 2 <i>Munf.</i> 244.	498, 501 502, 504
Fenwick and Shanks and M'Rae, 2 <i>Munf.</i> 478.	209
Ferguson and Moore's ex'x, 2 <i>Munf.</i> 421.	158
Fisher's ex'or v. Duncan and Turnbull, 1 <i>H. & M.</i> 563.	277
Fisher and Eldridge, 1 <i>H. & M.</i> 559.	174
Fitzhugh v. Anderson, 2 <i>H. & M.</i> 289	352
Flournoy and Halcomb, 2 <i>Call</i> , 438.	564
Poster and wife v. Crenshaw's ex'ors, 3 <i>Munf.</i> 514.	29
Foushee and Lee, cited 1 <i>Call</i> , 553.	291
Franklin and Snelson & Co. 6 <i>Munf.</i> 210-212.	317
Franklin v. Wilkinson, 3 <i>Munf.</i> 112.	425
Fristoe and Gibson, 1 <i>Call</i> , 62.	480
Fulcher and Gaines, 333, 340, 343	348
Fulton and McKim,	176, 179
Fugas's adm'r and Price's ex'or, 4 <i>Munf.</i> 68.	382, 498, 499, 500 504

G.

Gaines v. Fulcher, 333, 340, 343	348
Garth's ex'or v. Barksdale, 5 <i>Munf.</i> 101.	357
Gay v. Moseley, 2 <i>Munf.</i> 543.	249
Gerard v. Lacoste, 1 <i>Dallas</i> , 194.	4
Gibson v. Fristoe, 1 <i>Call</i> , 62.	480
Glasel's adm'r and De Lima, 4 <i>H. & M.</i> 369.	498-499
Goodall and Bullock, 3 <i>Call</i> , 44. 564, 565, 566, 569, 570, 572	
Gooseman v. Martin, 4 <i>Munf.</i> 533.	21, 22
Gordon and Williamson, 5 <i>Munf.</i> 257.	557
Graham v. Call ex'or of Means, 5 <i>Munf.</i> 396.	215, 217
Graves and Stanard, 2 <i>Call</i> , 369-374.	209

	PAGE
Graves and Timberlake, 6 <i>Munf.</i> 174.	188, 301, 455
Gray's adm'x v. Berryman, 4 <i>Munf.</i> 183-4.	187
Greenup and Alexander, 1 <i>Munf.</i> 134.	233, 235, 238
Gressom's distributees and Wall's ex'or, 4 <i>Munf.</i> 110.	499, 500
II.	
Halcomb v. Flournoy, 2 <i>Call</i> , 438.	564
Hansbrough v. Baylor, 2 <i>Munf.</i> 36.	479, 482
Harris and Dandridge, 1 <i>Wash.</i> 326.	217
Harris v. Harris, 6 <i>Munf.</i> 367.	435
Harrison v. Brock, 1 <i>Munf.</i> 22.	17
Haynes and Hunters, 1 <i>Wash.</i> 71.	174
Hancock and others and Nichol- son and Heth, 4 <i>H. & M.</i> 491.	499, 504
Herbert and Keel and Roberts, 1 <i>Wash.</i> 203.	277
Herbert v. Wise, 3 <i>Call</i> , 242.	396
Herndon's ex'ors and Murdoch and others, 4 <i>H. & M.</i> 200.	218, 580
Higginbotham v. Chamberlayne, 4 <i>Munf.</i> 547.	390
Higgenbotham v. Rucker, 2 <i>Call</i> , 513.	174
Hill v. Burrow, 3 <i>Call</i> , 342.	60, 174
Hite and Jolliffe, 1 <i>Call</i> , 329.	188, 296
Hollingsworths v. Dunbar, 5 <i>Munf.</i> 199.	277
Holloway and Dickenson and others, 6 <i>Munf.</i> 422.	427
Hook v. Nanny, 4 <i>H. & M.</i> 157.	390, 496
Hopkins and Watson v. Ward and others, 6 <i>Munf.</i> 38.	303, 304
Hubard's representatives and Jones, 6 <i>Munf.</i> 261.	481
Hull v. Cunningham's ex'or, 1 <i>Munf.</i> 336.	188
Hunter v. Fairfax's devisee, 1 <i>Munf.</i> 218.	187
Hunters v. Haynes, 1 <i>Wash.</i> 71.	174

I.

Irvine's adm'rs and Bullock, 4 <i>Munf.</i> 450.	245
Johnson and Brown, 3 <i>Call</i> , 259- 268.	241
Johnson's adm'r and Murrell, 1 <i>H. & M.</i> 450.	11

	PAGE		PAGE
Johnson and Richardson, 2 <i>Call</i> , 527.	387	Marshall v. Thompson, 2 <i>Munf.</i> 412	243
Jolliffe v. Hite, 1 <i>Call</i> , 329.	188, 296	Martin and Gooseman, 4 <i>Munf.</i> 533.	21, 22
Jones v. Hubbard's representatives, 6 <i>Munf.</i> 261.	481	Martin and Jones v. Stover, 2 <i>Call</i> , 514-519.	277
Jones v. Williams, 1 <i>Wash.</i> 231.	233, 235	Mason's devisees v. Peter's adm'r's, 1 <i>Munf.</i> 437.	432
Jordan v. Murray, 3 <i>Call</i> , 85.	357	Mayo v. Bentley,	381
K.		Mayo and Cheatwood, 5 <i>Munf.</i> 16.	467
Keel and Roberts v. Herbert, 1 <i>Wash.</i> 203.	277	Mercer and Hansbrough and Smallwood, 1 <i>Wash.</i> 290.	215
Keys v. McFatridge, 6 <i>Munf.</i> 18.	126		217, 264
Kincaid v. Cunningham, 2 <i>Munf.</i> 1.	498, 569	Miller and Beverleys, 4 <i>Munf.</i> 415-423.	92
King and Selden, 2 <i>Call</i> , 72.	174	Milstead v. Redman, 3 <i>Munf.</i> 219.	390
King and Taylor, 6 <i>Munf.</i> 358-367.	367, 368, 435, 437	Moffett and Chew ex'or of Wormley, 6 <i>Munf.</i> 120.	361
L.		Montague and Syme and others, 4 H. & M. 180.	390, 496, 498, 499
Iacoste and Gerard, 1 <i>Dallas</i> , 194.	4	Moore v. the Auditor, 3 H. & M. 232.	252
Lacy and Quarles, 4 <i>Munf.</i> 251.	1	Moore's ex'x v. Ferguson, 2 <i>Munf.</i> 421.	158
Leake v. Royster, 2 <i>Munf.</i> 280.	81, 82	Morris and Marks, 2 <i>Munf.</i> 407.	481
Ledbetter and Williamson, 2 <i>Munf.</i> 521.	174		545, 546, 547, 549
Lee v. Baird, 4 H. & M. 453.	418	Morris and Owen, 2 <i>Call</i> , 520.	356
Lee v. Foushee, cited 1 <i>Call</i> , 553.	291	Morris and Pickett, 2 <i>Wash.</i> 255.	291
Lee v. Love & Co., 1 <i>Call</i> , 497.	391	Morris and Overton v. Ross, 2 H. & M. 408.	499
Lee and Stuart, 3 <i>Call</i> , 421.	400	Moseley and Gay, 2 <i>Munf.</i> 543.	249
Lee v. Tapscott, 2 <i>Wash.</i> 276.	200	Moss v. Moss's adm'r, 4 H. & M. 297.	183, 184
Lemon v. Reynolds, 5 <i>Munf.</i> 552.	199	Munsel and Dorr, 13 <i>Johnson's N. Y. rep.</i> 430.	366
Lewis's exo'r v. Bacon's legatees and ex'ors, 3 H. & M. 89.	450	Murdoch and others v. Herndon's ex'ors, 4 H. & M. 200.	219, 580
Long v. Colston, 1 H. & M. 115.	76	Murray and Jordan, 3 <i>Call</i> , 85.	357
Love & Co. and Lee, 1 <i>Call</i> , 497.	391	Murrell v. Johnson's adm'r, 1 H. & M. 450.	11
Lyon v. Richmond, 2 <i>Johnson's N. Y. Ch. cases</i>	570		
M.		N.	
McCall v. Peachy, 1 <i>Call</i> , 55.	347, 348, 349, 350	Nanny and Hook, 4 H. & M. 157.	390, 496
McDonald and Witherinton, 1 H. & M. 303.	233, 238	Nash and Donald,	329, 330
McFatridge and Keys, 6 <i>Munf.</i> 18.	126	Neal's ex'ors and Chandler's ex'x, 2. H. & M. 124.	450
McGuire v. Parker's ex'or, 1 <i>Wash.</i> 368.	481	Nelson v. Nelson, 1 <i>Wash.</i> 136.	68
Mackey v. Bell, 2 <i>Munf.</i> 523.	338	Newby's adm'r's v. Blakey, 3 H. & M. 57-66.	64, 65, 66, 67, 69
Mackey v. Davis, 2 <i>Wash.</i> 219.	299	Nicholas and the Auditor, 2 <i>Munf.</i> 31.	498, 500, 502, 509
Mackey v. Young and wife,	329	Nicholson and Heth v. Hencock and others, 4 H. & M. 491.	499, 504
McKim v. Fulton,	176, 179	Noland v. Cromwell, 4 <i>Munf.</i> 155.	21, 22, 233, 241, 499, 502, 504
McMurdo and Fisher and Fenwick, 2 <i>Munf.</i> 244.	498, 501, 502, 504	Norvell v. Camm and wife, 2 <i>Munf.</i> 257-263.	21, 22, 233, 234, 235
Macon v. Crump, 1 <i>Call</i> , 575.	488		
McRae's ex'or v. Brooks and wife, 6 <i>Munf.</i> 157.	267		
Marks v. Morris, 2 <i>Munf.</i> 407.	481, 545, 546, 547, 549.		
Marshall and Saunders, 4 H. & M. 455.	391		

	PAGE		PAGE
Norvell and Ross, 3 Munf. 182.	367, 390	Rootes v. Webb, 4 Munf. 77.	157
O.		Ross and Duval, 2 Munf. 290.	498, 500
Opie and Brewer, 1 Call, 214.	323	501, 502, 504	
Overseers of Poor and Fall, 3 Munf. 495.	453	Ross and Morris and Overton, 2 H. & M. 408.	499
Owen v. Morris, 2 Call, 520.	356	Ross v. Norvell, 3 Munf. 182.	367, 390
P.		Ross v. Pinea, 3 Call, 568,	391
Parham and Allen, 5 Munf. 457.	174	Ross v. Poythress, 1 Wash. 120.	182
Parker's ex'or and McGuire, 1 Wash. 368.	481	Royall v. Eppea, 2 Munf. 479.	174
Pate v. Bacon & Co. 6 Munf. 219.	588	Royster v. Leake, 2 Munf. 280.	81, 82
Patterson's adm'r and Pollard, 3 H. & M. 67.	206, 299	Rucker and Higginbotham, 2 Call, 313.	174
Peachy and M'Call, 1 Call, 55.	347	S.	
348, 349, 350		Saunders and Chaney, 3 Munf. 51.	130
Peter's adm'r's and Mason's devisees, 1 Munf. 437.	432	Saunders v. Marshall, 4 H. & M. 455.	391
Pickett and Day, 4 Munf. 104.	531	Scott and Co. v. Dunlop, Pollock and Co. 2 Munf. 349.	219, 580
Pickett v. Morris, 2 Wash. 255.	291	Scriba and Deane, 2 Call, 415.	390
Pinea and Ross, 3 Call, 568.	291	Selden v. King, 2 Call, 72.	174
Pleasants v. Pleasants, 2 Call, 347.	230	Shanks and M'Kee v. Fenwick, 2 Munf. 478.	209
Pollard v. Baylor, 4 H. & M. 323	73, 367, 433	Sheppard's ex'or v. Stark and wife, 3 Munf. 29.	158
Pollard v. Patterson's adm'r, 3 H. & M. 67.	206, 299	Shermer v. Beale, 1 Wash. 11-14.	76
Poythress and Ross, 1 Wash. 120.	182	Simms and Cooke, 2 Call, 39.	506, 509
Price v. Campbell, 2 Call, 110, 124.	73, 482	Skipwith and Young, 2 Wash. 300.	340
Price's ex'or v. Fuqua's adm'r 4 Munf. 68.	382, 498, 499, 500	Smallwood v. Mercer and Hansbrough, 1 Wash. 290.	215, 217
Price and Trueheart, 2 Munf. 468.	306	504	264
Q.		Snelson and Co. v. Franklin, 6 Munf. 210-212.	317
Quarles v. Lacy, 4 Munf. 251.	1	Spencer and White v. Wilson, 4 Munf. 135.	495, 499, 500
R.		Stainback and others and Boyd and Swepson, 5 Munf. 305.	583
Randolph and Eppea, 2 Call, 184.	258	Stanard v. Graves, 2 Call, 369-374.	209
Ransome and Clay, 1 Munf. 454.	303	Stark and wife and Sheppard's ex'or, 3 Munf. 29.	158
Redman and Milstead, 3 Munf. 219.	390	Steers and Wigglesworth, 1 H. & M. 70.	17
Reeder and Baring, 1 H. & M. 162.	76	Stephens v. White, 2 Wash. 210.	17
Reno's ex'ors v. Davis and wife, 4 H. & M. 283.	371, 372	Steptoe and Templeman, 1 Munf. 339.	281, 282, 334
Reynolds and Lemon, 5 Munf. 552.	199	Stevenson and Wilson, 2 Call, 213.	182, 183
Reynolds v. Waller, 1 Wash. 164.	17	Stovall's ex'or v. Woodson and wife, 2 Munf. 303.	157, 267
Rice and Baird, 1 Call, 18.	7, 8	Stover and Martin and Jones, 2 Call, 514-519.	277
Richardson and Austin, 3 Call, 201-206.	277	Street and Cochran, 1 Wash. 79.	291
Richardson v. Johnston, 2 Call, 537.	387	Stuart v. Lee, 3 Call, 421.	400
Richmond and Lyon, 2 Johnson's N. Y. Ch. cases.	570	Sydnor v. Sydnors, 2 Munf. 263.	174
Robinson v. Brock, 1 H. & M. 212.	583, 584		

	PAGE		PAGE
Syme and others v. Montague, 4 H. & M. 180.	390, 496, 498, 499	Ward and others and Hopkins and Watson, 6 Munf.	38. 303, 304
T.		Watkins's ex'ors v. Tate, 3 Call,	521. 387
Taliaferro and Wallace, 2 Call,		Watkins v. Taylor, 2 Munf.	424. 479, 480, 481
478.	67, 70	Webb and Rootes, 4 Munf.	77. 157
Tally and Tate, 3 Call, 354.	174	West v. Belaches, 5 Munf.	194. 547
Tapscott and Lee, 2 Wash.	276. 200	White and Clay, 1 Munf.	162. 25, 26
Tate v. Tally, 3 Call, 354.	174	White and Stephens, 2 Wash.	210. 17
Tate and Watkins's ex'ors, 3 Call,		White, Whittle and Co. v. Banis- ter's ex'ors, 1 Wash.	168. 30
521.	387	Wigglesworth v. Steers, 1 H. & M.	70. 17
Taylor v. King, 6 Munf. 358-367.		Wilcox v. Calloway, 1 Wash.	38-42. 233, 234
367, 368, 435, 437		Wilkins v. Woodfin adm'r of Pearce, 5. Munf.	183. 499, 504
Taylor and Watkins, 2 Munf.	424. 479, 480, 481	Wilkinson and Cutchin, 1 Call,	1-6. 132
Templeman v. Steptoe, 1 Munf.	339. 281, 282, 334.	Wilkinson and Franklin, 3 Munf.	112. 425
Terrel v. Dick, 1 Call, 546.	496, 498	Williams and Clay, 2 Munf.	105. 267
499, 500, 502, 504, 568		Williams and Jones, 1 Wash.	231. 233, 235
Thomas and Turpin adm'r of James, 2 H. & M.	139. 498, 568	Williamson v. Gordon 5 Munf.	257. 557
Thompson and Marshall, 2 Munf.		Williamson v. Ledbetter, 2 Munf.	521. 174
412.	245	Wilson and Spencer and White, 4 Munf.	135. 495, 499, 500
Timberlake v. Graves, 6 Munf.		Wilson v. Stevenson, 3 Call,	213. 182, 183
174.	188, 301, 455	Winstons and Bullitt's ex'ors, 1 Munf.	269. 182
Totty's ex'ors v. Donald and Co., 4 Munf.	430. 219, 580	Wise and Herbert, 3 Call,	242. 396
Trueheart v. Price, 2 Munf.	468. 306	Witherinton v. McDonald, 1 H. & M.	303. 233, 238
Turpin adm'r of James v. Thomas, 2 H. & M.	139. 498, 568	Woodfin adm'r of Pearce and Wilkins, 5. Munf.	183, 499, 504
V.		Woodson and wife and Stovall's ex'or, 2 Munf.	303. 157, 267
Vass's adm'r and Chichester's ex'x, 1 Munf.	98. 68	Wyld and Ambler, 2 Wash.	36. 291
W.		Y.	
Walker and Vance, 3 H. & M.		Young and wife and Mackey, Young v. Skipwith, 2 Wash.	300. 329, 340
288.	411, 412		
Wall's ex'or v. Gressom's distrib- utees, 4 Munf.	110. 499, 500		
Wallace and Buster's ex'or, 4 H. & M.	82. 488		
Wallace v. Taliaferro, 2 Call,			
478.	67, 70		
Waller and Reynolds, 1 Wash.	164. 17		

TABLE OF CASES CITED.

BRITISH AUTHORITIES.

. This table is so arranged, that the cases may be found, as well by the names of the defendants, as of the plaintiffs. The letter "v" follows the latter; the word "and" the former.

A.	PAGE		PAGE
Abraham v. Bubb, cited 7 Bac.	290. 154	Allcott and Bennett, 2 T. Rep.	167. 588
Adams v. Pierce, 3 P. Wms.	11. 67	Appling and Doe, 4 T. Rep.	82. 223
Alexander v. Alexander, 2 Ch cases, 37.	24	Ashwith and Lord Darcy, Hobart, 234.	145
		Ayloff v. Scrimshire, Carth.	63. 8

B.

	PAGE	PAGE	PAGE
Baker and Palmer , 1 <i>Maule & Selwyn</i> , 66.	439	Brown v. Barkham , 1 <i>P. Wms.</i> 653.	75
Baltimore (Lord) and Penn , 1 <i>Vezey</i> , 154-150.	68	Bubb and Abraham , cited 7 <i>Bac.</i> 290.	154
Banbury v. Lisset , 2 <i>Stra.</i> 1212.	4	Burke v. Jones , 2 <i>Vesey & Beams</i> , 275.	451
Bance and Heams , 3 <i>Atk.</i> 630.	556	Burton's case , 5 <i>Co. rep.</i> 69.	73
Bank of England and Morrice , <i>Cases Temp. Talb.</i> 220.	24	Burton v. Slatten , 5 <i>Bro. Parl. cases</i> , 233.	74, 75
Barclay v. Walmsley , 4 <i>East</i> , 55	547, 549	C.	
Barkham and Brown , 1 <i>P. Wms.</i> 653.	75	Calmady v. Calmady , 3 <i>P. Wms.</i> 339.	2
Barnard and Doe , 1 <i>Esp. rep.</i> 11.	480	Cann v. Cann , 1 <i>P. Wms.</i> 727.	68
Barnes and others v. Hedley and Conway , 2 <i>Taunton's rep.</i> 184.	548	Charter v. Peter , <i>Cro. Eliz.</i> 597.	183
Barrington and Rees , 2 <i>Vezey</i> , 540.	8	Chesterfield v. Janasen , 1 <i>Atk.</i> 301.	479, 481
Bates v. Graves , 2 <i>Ves. jr.</i> 295.	363	Chettle and Hardcastle , 4 <i>Bro. C. C.</i> 163.	34
Battie and Moore , <i>Ambl.</i> 271.	480, 543	Clapham and Moulton , 6 <i>Bac.</i> 226.	14
Battison and Goilmere , 1 <i>Vern.</i> 48.	68	Clay and Smith , <i>Ambl.</i> 645.	529, 530
Beanett v. Allcott , 2 <i>T. Rep.</i> 167.	587, 588	Cochran and Rich , 9 <i>Ves. jr.</i> 369.	583
Bennett and Cockshott , 2 <i>T. Rep.</i> 765.	362	Cocksedge v. Fanshaw , <i>Dougl.</i> 132.	323, 326
Bennett v. Francis , 2 <i>Bos. & Pull.</i> 553.	62	Cockshott v. Bennett , 2 <i>T. Rep.</i> 765.	362, 364
Benson v. Vernon , 3 <i>Bro. Parl. cases</i> , 626.	270	Cole v. Robins , <i>Bull. N. P.</i> 173.	17, 363
Bilbie v. Lumley and others , 2 <i>East</i> , 469.	63	Coleman v. Seymore , 1 <i>Vezey</i> , 209.	55
Birkhead and Wortley , 2 <i>Vezey</i> , 571.	24	Coles and Marteney , 1 <i>Maule & Selwyn</i> , 140.	479
Bishop of London v. Webb , 1 <i>P. Wms.</i> 527.	152, 155	Collins v. Blantern , 2 <i>Wils.</i> 341.	361, 362
Blake ex'or of Dale v. Lawrence , 4 <i>Esp. rep.</i> 147.	73, 76	Connor v. West , 5 <i>Burr.</i> 2673.	26
Blantern and Collins , 2 <i>Wils.</i> 341.	361, 362	Cooth v. Jackson , 6 <i>Ves. jr.</i> 34.	215
Blesard v. Hirst , 5 <i>Burr.</i> 2672.	488	Corne and Russel and wife , 1 <i>Salk.</i> 119.	308
Bloome and Jesus College , 3 <i>Atk.</i> 263.	24	Costello and Knox , 3 <i>Burr.</i> 1791.	282
Boen and Yates , 2 <i>Stra.</i> 1104.	363	Cottingham v. King , 1 <i>Burr.</i> 629.	26
Bonafous v. Rybot , 3 <i>Burr.</i> 1374.	74, 75, 78	Cranwell and Robson , 1 <i>Dick.</i> 61.	269
Bond v. Hopkins , 1 <i>Sch. & Lefr.</i> 428.	503	Cunyngham v. Cunyngham , <i>Ambl.</i> 89.	267, 269
Bosanquet v. Dashwood , <i>Cases Temp. Talb.</i> 38.	543, 548, 549	Cuthbert v. Haley , 8 <i>T. Rep.</i> 390.	544
Bowen and Largan , 1 <i>Sch. and Lefr.</i> 299.	24	D.	
Bragg and Wilson , cited 7 <i>Bac.</i> 294.	154	Darcy (Lord) v. Ashwith , <i>Hobart</i> , 234.	145
Brest and Scott , 2 <i>T. Rep.</i> 238.	544, 546	Darley v. Darley , 3 <i>Atk.</i> 393.	583
Bright v. Eynon , 1 <i>Burr.</i> 395.	130, 362	Dashwood and Bosanquet , <i>Cases Temp. Talb.</i> 38.	543, 548, 549
Bromley and Smith , <i>Dougl.</i> 696.	543	Davis v. Hardacre , 2 <i>Campb.</i> 375.	479
Brookes and Dix , 1 <i>Stra.</i> 61.	308	Davis and Smith , cited 2 <i>Selwyn's N. P.</i> 695.	383
Brooks v. Reynolds , 1 <i>Bro. C. C.</i> 183.	24	Dawkes and wife v. De Lorane , 3 <i>Wils.</i> 213.	4
Brotherton v. Hatt and others , 2 <i>Vern.</i> 574.	479	Dayrell and Rorke , 4 <i>T. Rep.</i> 411.	183
		Dean v. Newhall , 1 <i>T. Rep.</i> 68.	8, 9
		De Lorane and Dawkes & wife , 3 <i>Wils.</i> 213.	4
		De Mattos and Worsley , 1 <i>Burr.</i> 467.	561

	PAGE		PAGE
Redford and Todd & wife, 11 <i>Mod.</i>		Stevens and Meriton, <i>Willcs</i> , 271.	183
264.	308	Style and Slanning, 3 <i>P. Wms.</i> 337.	2
Rees v. Barrington, 2 <i>Vezey</i> , 540.	8	Swain v. Hall, 3 <i>Wils.</i> 45.	209
Regina v. Sewell, 7 <i>Mod.</i> 119.	543		
Reynolds and Brooks, 1 <i>Bro. C. C.</i>		T.	
183.	24		
Reynolds and Mitchell, 10 <i>Mod.</i>		Tatlock v. Harris, 3 <i>T. Rep.</i> 174-182.	5
130.	362	Tatlock and Peel, 1 <i>Bos. & Pull.</i>	
Rich v. Cochran, 9 <i>Vezey jr.</i> 369.	583	422.	7, 8
Richardson and Smith, <i>Willcs</i> , 24.	467	Titley and Shepherd, 2 <i>Atk.</i> 348.	556
Roach v. Haines, 8 <i>Ves. Jr.</i> 589.	583	Todd and wife v. Redford, 11 <i>Mod.</i>	
Robins and Cole, <i>Bull. N. P.</i> 172.		264.	308
	17, 363	Tullidge v. Wade, 3 <i>Wils.</i> 18.	587
Robson v. Cranwell, 1 <i>Dick.</i> 61.	269		
Rorke v. Dayrell, 4 <i>T. Rep.</i> 411.	183	U.	
Rumball and Maddock, 8 <i>East</i> , 304.	482		
Russel and wife v. Corne, 1 <i>Salk.</i>		Underwood v. Parks, 2 <i>Stra.</i> 1200.	
119.	308		14, 467
Rybot and Bonafous, 3 <i>Burr.</i> 1374.		V.	
	74, 75, 78		
S.		Vaughan and Grant, 3 <i>Burr.</i> 1516.	5
		Vernon and Benson, 3 <i>Bro. Parl.</i>	
Scott v. Brest, 2 <i>T. Rep.</i> 238.	544, 546	cases, 626.	270
Scott v. Nesbitt, 2 <i>Bro. C. C.</i> 649.	548	Vicars v. Haydon, <i>Comp.</i> 841.	187
Scrimshire and Ayloffe, <i>Carth.</i> 63.	8		
Sewell and Regina, 7 <i>Mod.</i> 119.	543	W.	
Seymore and Coleman, 1 <i>Vezey</i> , 209.	55		
Shelly and Snellger, 2 <i>Exp. N. P.</i>		Wade and Tullidge, 3 <i>Wils.</i> 18.	587
520.	467	Walker v. Perkins, 3 <i>Burr.</i> 1568.	361
Shepherd v. Titley, 2 <i>Atk.</i> 348.	556	Walmsley and Barclay, 4 <i>East</i> , 55.	
Shode v. Parker, 2 <i>Vern.</i> 316.	73		547, 549
Skip v. Huey, 3 <i>Atk.</i> 91.	7	Walton and Woodward, 5 <i>Bos. & Pull.</i> 476.	588, 589
Slanning v. Style, 3 <i>P. Wms.</i> 337.	2	Washborn v. Downes, <i>Cases in Ch.</i>	
Slatten and Burton, 5 <i>Bro. Parl.</i>		213.	231
cases, 233.	74, 75	Webb and Bishop of London, 1 <i>P.</i>	
Smith v. Bromley, <i>Dougl.</i> 696.	543	<i>Wms.</i> 527.	152, 155
Smith v. Clay, <i>Ambl.</i> 645.	529, 530	West and Connor, 5 <i>Burr.</i> 2673.	26
Smith v. Davis, cited 2 <i>Schw. N. P.</i>		Woodward v. Walton, 5 <i>Bos. & Pull.</i> 476.	588, 589
695.	383	Worsley v. De Mattos, 1 <i>Burr.</i> 464.	
Smith and Gibson, 2 <i>Atk.</i> 183.	147		361
Smith and Newman, 2 <i>Salk.</i> 642.	308	Wortley v. Birkhead, 2 <i>Vezey</i> , 521.	24
Smith and Nisbet, 2 <i>Bro. C. C.</i> 579.		Wright v. Pindar, cited 2 <i>H. Bl.</i>	
	7, 8, 9	207.	323
Smith v. Richardson, <i>Willcs</i> , 24.	467	Wright and Young, 1 <i>Campb.</i> 141.	480
Snellger v. Shelly, 2 <i>Exp. N. P.</i>		Wyse and Holles, 2 <i>Vern.</i> 289.	75
520.	467		
Squire and Kemp, 1 <i>Vezey</i> , 205.		Y.	
	269, 270		
Stainbridge and Jolland, 3 <i>Ves. jr.</i>		Yates v. Boon, 2 <i>Stra.</i> 1104.	363
478.	255	Yea and Hammett, 1 <i>Bos. & Pull.</i>	
Stanley v. Leigh, 2 <i>P. Wms.</i> 688.	231	155.	479
Stapleton v. Stapleton, 1 <i>Atk.</i> 10.	68	Young v. Wright, 1 <i>Campb.</i> 141.	480
Steers v. Lashley, 6 <i>T. Rep.</i> 61.	480		

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

Commencing October, 1817.

IN THE FORTY-FIRST YEAR OF THE COMMONWEALTH.

Gosden and Wife against Tucker's Heirs. Decided Oct. 15th, 1817.

THE appellants exhibited their Bill in the Superior Court of Chancery for the Richmond District, (in 1807) setting forth, that the female plaintiff *Mary* was formerly wife of *Joel Tucker* ancestor of the defendants;—that she, being seized in fee in her own right of a parcel of land, called the Bowling Green, adjacent to the city of Richmond, consented, after much importunity from her husband *Tucker*, to join him in a sale of that property, in consideration of a positive verbal agreement and promise on his part, that he would purchase other land on Shockoe hill, build thereon, and convey the same to her for the same estate she held in the Bowling Green; that she accordingly did join in the sale of the Bowling Green; and *Tucker* actually bought and built on a lot on Shockoe hill containing two acres;—but died without settling the same on her according to his agreement. The prayer of the Bill therefore was, that the defendants should be decreed to convey the lot on Shockoe hill to *ings*, ought to be enforced in equity against his heirs; notwithstanding a great disparity in value between the lands so bought and sold; it appearing that, at the time of the marriage, the husband was very poor, and that all the real property in his possession, (except the land purchased as aforesaid,) was held in right of the wife.

1. A parol agreement, between husband and wife, that, in consideration of her joining him in a conveyance of a parcel of her lands, he would purchase certain other lands, build thereon, and convey the same to her, being clearly proved, and partly executed, by her joining in the deed, and his making the purchase and erecting the build-

See *Quarles v. Lacy*, 4 Munf. 251.

OCTOBER,
1817.

Gosden &
Wife
v.
Tucker's
heirs.

the female plaintiff, or at least assign her dower therein.

A joint answer of the adult defendants, admitted the plaintiff *Mary's* title originally to the Bowling green, and the sale thereof by *Joel Tucker*, in which she joined; but denied the agreement alledged in the Bill, which, however, (the plaintiffs having put that fact in issue by a general replication,) was fully proved by depositions. It also appeared by exhibits, that four acres of land in Duval's addition (the Bowling Green) were conveyed by Tucker and wife to *James Thomson*, for the consideration of 48l., by deed dated June 26, 1800; and that, on the same day, *Alexander M^r Rae* and wife conveyed to *Joel Tucker* the two acres of land on Shockoe hill, for the consideration of one thousand dollars.

At September term 1809, Chancellor TAYLOR dismissed the Bill as to so much thereof as prayed specific execution of the agreement, but directed the plaintiff *Mary's* dower, in the lot bought of *M^r Rae*, to be assigned her by commissioners: and, at June term, 1813, it being admitted that her dower had been assigned in another suit, the bill was finally dismissed with costs.

This Court granted the plaintiffs an appeal.

Wickham for the appellants, contended that a Court of Equity will enforce a contract between husband and wife, founded on the consideration of her relinquishing her right to dower, or joining in a sale of her real property;—in like manner as if she were a feme sole. It has long

(a) 1 Fonbl. been settled not to be necessary to interpose trustees. (a)
102—3; 3 P. The Court will set up the contract, tho' void at law.
Wms. 337.
Slanning v. As to the agreement in this case, the testimony is clear;
Style; *Ibid* and the Statute of Frauds does not apply, the contract
339, *Calmady* having been executed on one side.
v. *Calmady*.

Leigh contra. The proof of the agreement, I admit, is sufficient; but the question is, will the Court enforce it? The property of *Mrs. Tucker* sold for 48l. only; that afterwards purchased by her husband, was ten or twenty times its value. And that property, so much more valuable, is what she claims;—not to be paid her 48l., with interest. Is this claim reasonable? Surely a more unreasonable one was never exhibited. The Chancellor did

right in dismissing the bill altogether. I know of no instance of an *executory* contract, for a *sale* from husband to wife, being enforced in equity.

Wickham in reply. All contracts are *executory* when first made. (b) *Inadequacy* of consideration is not sufficient to vitiate a fair contract. Besides; it appears by the record, that the husband, in the present case, had not a shilling on earth but what he got by the wife. This circumstance repels the objection of hardship. The truth is, he chose to lay out *her* money for her benefit. It is not pretended that there are any creditors; and, if there were, their claims would not be affected by any decree between these parties.

Judge ROANE pronounced the Court's opinion.

On the *merits*, and as between the present parties, the Court is of opinion that the decree is erroneous, and that the prayer of the bill ought to be granted:—but one of the defendants, the infant, has not answered the bill. For this cause, the Decree is to be reversed, and the cause remanded for farther proceedings.

OCTOBER,
1817.

Gosden &
Wife
v.
Tucker's
heirs.

(b) *Moore*
v. *Freeman*,
Bunb. 105.

Jolliffe against Higgins.

Decided Oct.
21st, 1817.

IN an action of *assumpsit* brought by *Robert Higgins* against *John Jolliffe*, in the Superior Court of Frederick County, the declaration contained two Counts; the first *special*, on an order drawn by the defendant, August 15, 1810, on a certain *Obed Waite*, directing him to pay to the plaintiff the sum of \$108 85, "which the defendant "by the said order stated he had lodged in the hands of "the said *Waite*, and was the property of *Major Higgins*, "(meaning the said plaintiff,) as guardian of his children "by *Mary Higgins*, late *Mary Jolliffe*;" which order was drawn "for a good and valuable consideration, that is being given;) tho' such draft or order be not negotiable as a bill of exchange; being drawn on a particular fund,—not in favour of the payee "or order," nor in terms, "for value received."

1. The payee of a draft or order, purporting to be for money lodged by the drawer in the drawee's hands, belonging to such payee, may recover of the drawer, upon the drawee's refusing payment; (timely notice of such refusal

2. A guardian may bring *assumpsit* in his own name, upon a draft or order payable to himself as guardian, for money due to his ward.

OCTOBER,
1817.

Jolliffe
v.
Higgins.

"to say, for the payment of the said sum of money, be-
"longing to the plaintiff as guardian aforesaid, and was
"duly presented, on the 19th of August 1811, to the said
"Waite, who, by his indorsement thereon, refused to pay
"the same;" &c. The other was a general Count, for
"money had and received by the defendant for the "use
"of the plaintiff as guardian as aforesaid." Plea *non*
assumpsit.

At the trial the defendant demurred to the evidence;
the plaintiff having shown and proved to the jury the or-
der, with the protest, or written refusal of *Obed Waite*
to pay it; which, being set forth in *hæc verba*, corres-
ponded with the description thereof in the declaration;
and also proved that, at several times, in the fall "of 1811,
"and previous to the commencement of this suit, there
"was notice of the protest given by the plaintiff to the
"defendant, and a demand made of payment of the amount;
"that the drawee was, at the time of the draft, and ever
"since, a man of sufficient property to pay it, and of un-
"doubted solvency; and also that he had not, at the time
"of the draft, or ever after, any fund in his hands, out
"of which he ought to have paid the said draft, or any
"funds of the drawer, whatsoever."

The Jury found for the plaintiff \$108 85 cents dam-
ages, with legal interest thereon from the 15th of August
1810, subject to the opinion of the Court upon the De-
murrer.

The Court having entered judgment for the plaintiff,
the defendant obtained a writ of *Supersedeas*, from a
judge of this Court.

Wickham for the plaintiff in error. Suit could not be
maintained upon the writing in question, as a bill of ex-
change; it being drawn on a particular fund, and omitting
the words "or order," which are absolutely necessa-

(a) *Gerard ry.*-(a) Besides;—our act of Assembly making bills ne-
v. *Lacoste*, 1. gotiable, points out a particular form and mode of pro-
Dallas 194; test, which has not been observed in this case. If I am
Dawkes and correct in this, no action is sustainable on the first Count
wife v. De La- in the declaration.
vane, 3 Wils. 213; *Banbu-*
ry v. Lisset, 2 2. Whenever there is a demurrer to evidence, and it
Stra. 1212. appears that the evidence applies to the defective Count

only, no judgment can be given for the plaintiff. Here, admitting the second Count to be a good one, there is no evidence applying to that Count.

OCTOBER,
1817.

Jelliffe
v.
Higgins.

3. If any person was entitled to sue, the children for whom Higgins was guardian, might, but not Higgins himself.

Leigh contra. I admit this order or draft is not a bill of exchange: but that question is important only where the negotiability of the paper is the point in controversy. The' not negotiable, it is binding between the parties to the transaction. The payee may recover of the drawer.(b) I admit too, that the non acceptance in this case, is not a legal protest; but that is unimportant. (b) 1 Esp. N. P. 25.

2. The second Count is substantially good, and the evidence does apply to it; for a draft is, virtually, an acknowledgment that the drawer has money belonging to the payee. Even if the first Count be bad, it may operate as notice of the special matter intended to be offered in evidence upon the other. The general money Counts are inserted, on purpose to provide for the event of the special Count's being found defective.(c)

3. When a writing is given to a guardian or executor, he may bring suit upon it. So also may a factor. So, if an executor takes a bond for property of his testator sold by him, he may sue upon it and declare in the debt and *detinet*. (c) 3 Term Rep. 174, 182, 3 Burr. 1516; Chitty on Bills, 191, 192.

Wickham in reply. A writing not under seal, does not in itself import a consideration. A note of hand, being not "for value received," may be given in evidence; but the consideration must be proved. If, therefore, this draft had been good in other respects, it could not support the action, no consideration appearing. Drawn, as it is, without the words "for value received," and not payable to the payee "or order," it may have been given for the purpose of getting the money of the drawer, for his own benefit, out of the drawee's hands. There is nothing to show that the payee is entitled to it.(1)

Where the writing is only evidence of a debt due to the Ward, the suit must be brought by the Ward himself,

(1) Note. The words of the order itself shewed it was drawn for money belonging to the payee, which the drawer asserted was lodged by himself in the hands of the drawee.

Oceana,
1817.

Jolliffe

v.
Higgins

not by the Guardian. But where it is the foundation of the action, as in *Peter, v. Cocke* 1 Wash. 257, the case is otherwise: the bond being taken to A. B. "guardian, executor, or factor, &c." the words of addition may be rejected. The rule is, that if the document itself be one that can be declared upon, the guardian, executor, or factor may sue upon it; but if it be such as can only be given in evidence of a debt, the person to whom the debt is due must bring the suit.

Leigh. This distinction is a new one to me. I should like to see an authority in support of it. Whether *assumpsit* or *debt* be brought on a promissory note, in either case the note is but evidence of the debt. According to Mr. *Wickham's* argument, an executor may maintain *debt* on a note to himself, but cannot *assumpsit*.

The Court affirmed the Judgment.

Ward against Johnson.

Decided
Oct. 22, 1817.

1. Where an obligee covenants not to sue one of two joint and several obligors, (and much more, where he binds himself not to sue him for a limited time,) this does not amount to a release, but a covenant only; he may still sue the other obligor at law.

THE Judgment in the case between these parties, (reported in 1 *Munf.* 45,) being certified to the Superior Court of Greenbrier County, *Ward* filed a plea stating, in substance, that he was surety for *William Long*, in the bond on which the suit was originally brought; that the confession of judgment, with stay of execution, was given and accepted without his assent; and that thereby he was discharged; stating also, (as the fact was,) that the confession of judgment was *on terms*; *Long* having liberty to discharge it by a conveyance of land.

To this plea the plaintiff demurred, and judgment was given in his favour; whereupon *Ward* obtained a *Superseas* from this Court.

Wickham for the plaintiff in error. The Judgment with a stay of execution, (especially with such a condition,)

2. The majority of the Court were inclined to think that a surety is exonerated in equity, *the not at law*, by the plaintiff's accepting a confession of judgment from the principal, and covenanting thereupon to grant him a stay of execution for a limited time; the surety not having assented to such new contract and compromise.

OCTOBER.
1817.

Ward
v.
Johnson.

was a *merger* of the original obligation, so that no farther proceedings could take place upon it, either against *Long* the principal or *Ward* the surety. Especially as to the *surety*; a new contract with the principal, appearing on the record in the suit, to which contract the surety never assented, is, on *legal principles*, a bar to any future proceedings on the bond against *him*, in that action or any other. (a)

Wirt contra. The doctrine is laid down by *Buller, J.*, in 1 *Bos. & Pul.* 422, that no favour shewn to the principal, which does no injury to the surety, can discharge the latter. The cases cited by Mr. *Wickham*, from *Brown* & *Atkins*, were not at law, but in equity.—In *Nisbet v. Smith*, a credit of three years was given to the principal, against the surety's express directions: the debt too was safe as against the principal: the Court therefore enjoined the plaintiff from proceeding against the surety. In *Skip v. Huey*, the bond was surrendered to the surety, with a receipt in full, to quiet him; and other notes and a draft were given, in lieu of the bond.—Lord *Hardwicke* says explicitly, that the whole transaction was intended expressly to discharge the surety.

Wickham in reply. 7 *Bac.* 506, contains a reference to the authorities on this subject, and lays down a principle, which has been repeatedly recognized by this Court, in *Baird v. Rice*, 1 *Call* 18, and *Croughton v. Duval*, 3 *Call* 69; that “if an obligee in a bond make any variation in the original contract with the principal, without the privity of the surety, as, if he change the nature of the security, or agree to postpone the day of payment, he thereby discharges the surety.”

How is the line to be drawn between six months' indulgence, or three years?—If you change the contract, and tie up your own hands, so that you cannot proceed against the principal, is not the surety exonerated?—The principal is discharged from the old contract; how then can the surety be bound by it? He surely is not bound by the new contract to which he was no party:—he therefore must be discharged altogether.

The possibility of injury to the surety is enough, without any actual injury.—The time of performance is of the

(a) *Nisbet v. Smith*, 2 *Bos. ch. cases*. 579; *Skip v. Huey*, 3 *Atk.* 91; 7 *Bac.* 506.

OCTOBER,
1817.

Ward
v.
Johnson.

essence of the contract.—I am confident that the principle on which the Court went in *Rees v. Barrington*, 2 Ves. p. 540, and *Nisbet v. Smith*, was not that another security was taken, but that the extension of the time without the surety's consent, discharged him.

A mere *forbearance* for years to enforce a contract, is a very different thing from making a new contract *binding* the plaintiff to wait six months.

The case of *Peel v. Tatlock*, in 1 Bos. & Pul., has no bearing that I can see upon this case.

I admit there is some difficulty in the question whether a Court of *common law* can take notice of this discharge. But the exoneration of the surety being by matter of record *in the same cause*, I contend that he ought not to be turned 'round to a Court of Equity.

If a creditor can take a confession of judgment, in a *joint* action, from one of the defendants, *giving him time*, and can afterwards get a judgment against another, he can favour one improperly to the injury of the other, and make that several which before was joint.—The bond in this case was joint and several; but the suit, having been brought against both, was an election, on the part of the plaintiff, to consider it joint. He might either have sued them jointly or severally; but, having sued *jointly*, he has no right to make a distinction.

Wirt. None of the authorities in this country have departed from the principle laid down by Judge Buller in Bos. & Pul.—*Baird v. Rice* was a case of particular hardship:—the favour shown was to the *prejudice* of the surety.

Judge ROANE pronounced the Court's opinion.

The Court is of opinion, upon the authority of the cases of *Dean v. Newhall*, (1 Term Rep. 68,) and *Lacy v. Rynaston*, (12 Mod. 551,) that, where an obligee covenants not to sue one of two joint and several obligors, (and much more where the obligation is only not to sue him for a limited time, (*Ayliffe v. Scrimshire*, Carth. 63,) this obligation does not amount to a release, but is a covenant only; and that the obligee may still sue the other obligor *at law*.—And, on this ground, the Court affirms the judgment.

At the same time, the majority of the Court are inclined to think, upon the authority of the case of *Nisbet v. Smith*, (2 Bro. ch. cases, 581,) recognized in this Court in the case of *Croughton v. Duval*, (3 Call 69,) that, where, as in this case, during the pendency of a suit, the creditor enters into a covenant, upon receiving a confession of judgment by the principal, to stay execution for a given time,—as (to use the words of the Court in *Croughton v. Duval*,) “this amounts to a new contract “and compromise with the principal, without the consent of the surety, and deprives him of his remedy by “a bill of *quia timet*, the security is thereby discharged,” in *Equity*, from the obligation of his contract.

OCTOBER,
1817.

Ward
v.
Johnson.

Judge CABELL delivered the following separate opinion.

It was decided in the case of *Dean v. Newhall*, (8th Term Rep. 168,) that a covenant never to sue one of two joint and several obligors, was not, at law, a discharge of the other obligor; even although that other be a security. If this decision be correct, of which I have no doubt, it follows *a fortiori* that the agreement for a temporary stay of execution against the principal in the case now before the Court, was not at law, a discharge of the security.—I am therefore of opinion to affirm the Judgment.

Whether the appellant be entitled to relief in equity, or not, is a question on which I forbear to express any opinion. The case when it goes before a Court of Chancery, may bear a different aspect, by the introduction of circumstances which the appellee knew were unnecessary to be exhibited to the Court of law; and I am not prepared to say that there is any rule in equity by which a temporary suspension, even for a day or an hour, of proceedings once commenced against a principal, will, in all cases and under all circumstances, be a discharge of the security. On this point, however, I wish to be understood as giving no opinion at present.

Withers's Executrix against Withers's Executor.

Decided Oct.
22, 1817.

IN March 1814, *William Withers*, surviving executor

1. After a judgment in detinue, a new action of detinue against the same defendant for the same thing, in which the former judgment is not declared upon, but is only relied on as evidence of title, cannot be maintained.

of *Thomas Withers* deceased, brought an action of detinue, for a slave, in the Superior Court of Fauquier County, against *Janet Withers* executrix of *Enoch R. Withers*; the declaration being in the common form, but charging the detention by the testator, as well as by the defendant. Plea *non detinet*. Verdict for plaintiff for the slave, of \$100 value, and \$836 damages for detention; subject to the opinion of the Court on a demurrer to evidence, which set forth, (among other matters,) 1. the record of an action of detinue for the same slave, brought in the County Court of Fauquier by *Thomas Withers*, in which he recovered judgment against *Enoch R. Withers*, (in August 1794,) for the slave, of 100*l* value, and 36*l*. damages:—

2. *Quere*, whether any action other than a *scire facias*, can be maintained upon a judgment in detinue?

2. the record of a suit in the same County Court in Chancery, wherein *Enoch R. Withers* was plaintiff, alleging in his bill, that the said slave had been given to him by *Thomas Withers* (who was his father,) and that the trial of the action of detinue was had in the absence of his witnesses, so that he was unable to make defence at law; and therefore praying an injunction, which was granted:—the said record shewing, also, that the suit abated in March 1795, by the death of *Thomas Withers*, and was revived against his executors; after which, (in the year 1796,) the complainant took three depositions, proving the gift alleged in the bill;—an answer was filed by the executors, in 1809, denying the complainant's allegations; and, in 1813, the suit abated by his death:—3. proof of the identity of the slave; of his being in the possession of *Enoch R. Withers* and of his executrix, ever since the judgment was obtained;—of the death of *Thomas Withers*, December 14th, 1794; and of the qualification of his executors, January 26th, 1795.

On this demurrer to evidence, the Superior Court gave judgment for the plaintiff, to which the Court of Appeals granted a *Supersedeas*.

Call for the plaintiff in error. The judgment now in question can not be supported.—It is a subsequent judg-

ment in *detinue* for the same slave, for whom a prior judgment had been obtained. A new action of *detinue* ought not to have been brought, but a *scire facias*. Decided Oct. 1817.

Leigh contra. The plaintiff's title is never set forth in the declaration in *detinue*. If the title be by a Judgment, the plaintiff may recover upon that title, by giving the judgment in evidence, as he might a bill of sale.—A *scire facias* would not have been a complete remedy:—it would not have given the intermediate damages, for detention of the slave, subsequent to the judgment, while the suit in Chancery was pending. Withers's executrix v. Withers's executor.

Call in reply. The form of the declaration in *detinue* is, in general, such as Mr. Leigh states; but where *detinue* is brought on a Judgment, it is necessary to set it forth particularly, to prevent the defendant from being harassed twice for the same thing.

The plaintiff can get no better remedy by action of *detinue*, than he might by *scire facias*.—According to the principle of Mr. Leigh's argument, a plaintiff, having obtained a Judgment in *indebitatus assumpsit*, might bring the same action again, and give the judgment in evidence.

The doctrine is laid down in *Murrell v. Johnson's adm'r.* 1 H. & M. 450, that, while a judgment in *detinue* for a slave remains unsatisfied, the plaintiff can not bring another action of *detinue*, against a third person, for the same slave.

Leigh. The marginal note to the case of *Murrell v. Johnson's adm'r.*, is not justified by the decision of the Court. (1)

Judge ROANE pronounced the Court's opinion.

The Court, (not deciding whether an action, other than a *scire facias*, can be maintained on a judgment in *detinue*,

(1) Note. It is true that the point was not involved in the decision of that case; but this Court expressed it's disapprobation of the instruction given to the Jury by the District Court; which instruction was, that a recovery of the slave might be had in such subsequent action, unless the defendant to such action could prove payment of the value of the slave, by the original defendant, to the plaintiff.—If the converse of this proposition, viz. that such recovery cannot be had against a third person, while the judgment against the original defendant remains unsatisfied, be incorrect, *quere*, under what circumstances could such recovery be had?

Ostheim,
1817.

Withers's ex-
ecutrix
v.
Withers's ex-
ecutor.

or not,) is of opinion, that the present action is not brought upon the judgment, but is a new action of detinue, in which the former judgment is not declared upon, but is only relied upon as evidence of title, and not as fixing the value and damages, as to which, this action is in the nature of a new trial, in a case in which there has already been a judgment.—The judgment is therefore reversed with costs; and judgment is to be entered for the appellant.

Decided Oct.
24, 1817.

South against Solomon and others.

1. The 2d section of the Act of 1792 concerning slaves, extends only to slaves brought into this commonwealth by the absolute owner of them, and not to such as are bro't in by wrong doers, or by persons having only a limited interest in them.

THE question in this case, arising on a special verdict in a suit for freedom, was, whether the appellees, who were slaves unlawfully brought from North Carolina into this Commonwealth, and kept therein more than a year, by the appellant, who had in them a *life estate* only, were entitled to freedom under the 2d. section of the Act of 1792; (edi. of 1794, 1808 and '14, c. 103.) The County Court of Russel decided against them; but the Superior Court of law reversed the judgment, and rendered one in their favour, from which, *South*, (the importer) appealed to this Court.

Call for the appellant. The act of *South*, in bringing the slaves into the state, did not emancipate them, as he had only a *life estate*. He could forfeit his own interest, but not that of those entitled in remainder. The reasonable construction of the law is, that, if the owner brings them in, he shall forfeit, and they shall be free.

2. The Court will not give such a construction to the general words of an Act, as would subject the property of innocent individuals to loss by the acts of third persons; nor such as would favour a *partial* emancipation during the interest of a particular tenant of slaves.

Wm. Hay, Jr. for the appellees. The words of the Act are general; there is nothing to justify the Court in restricting its operation. If Mr. *Call's* construction were permitted, every evil intended to be guarded against, would be let in. *South* was the proprietor *sub modo*, for he had a *life estate*.

The following opinion of the Court was delivered by Judge ROANE.

would favour a *partial* emancipation during the interest of a particular tenant of slaves.

The Court is of opinion that the 2d. section of the Act of 1792, ch. 103, only extends to cases of slaves brought in by the absolute owner of them, and not to such as are brought in by wrong doers, or by those having only a limited interest in them. We are not disposed to give a construction to the general words of an Act, which would subject the property of innocent individuals to loss by the acts of third persons: and as to a construction favouring a *partial* emancipation during the interest of a particular tenant, it will not be adopted by the Court, because, in addition to other reasons, it would produce the same result, to the injury of the reversioner or remainder man.

The construction adopted by the Court is justified by analogy to the Act of 1806, (R. Code, Edi. of 1808, p. 95.) the present law on the subject, which expressly provides that "all the right" of the person bringing in a slave shall be forfeited, and the slave be sold for the term for which he is owned by the importer. This sale, too, it is to be remarked, will not enable the slave to abscond, as a *partial* emancipation would, and thus enable him to defeat the interest of the person in remainder.

On these grounds, the Court reverses the judgment of the District Court, and affirms that of the County Court.

O'Connor,
1817.

South
v.
Solomon &
others.

Grant against Hover.

Decided Oct.
27, 1817.

THIS was an action of slander brought by the appellee against the appellant in the Superior Court of Kanawha County. The declaration charged the defendant with having said "that the plaintiff was a perjured rascal," meaning thereby that "the plaintiff was guilty of swearing falsely in a judicial proceeding where he was legally called upon to depose, and a lawful oath administered to him." Plea *Not Guilty*. At the trial, the defendant, (after having examined *Andrew Donnelly*, a witness introduced by him, (which witness was the mag-

1. In an action of slander, for charging the plaintiff with perjury in a judicial proceeding; the defendant, on the plea of *not guilty*, (tho' not permitted to prove the falsity of the words sworn

by the plaintiff,) may prove *what those words were*, in mitigation of damages.

OCTOBER,
1817.

Grant
v.
Hover.

istrate before whom the testimony impugned had been given by the plaintiff,) whether the plaintiff refused to answer any question put to him by the said magistrate, who said he did not refuse, but sometimes hesitated before he gave the answer,) then wished to interrogate the witness as to *what* the plaintiff swore before him; but the Court would not permit the defendant's counsel to introduce such evidence, "*considering that the truth or falsehood of his answers were improper, upon the plea of not guilty;*" "the opinion of the Court being that the defendant, upon that plea, had a right, in mitigation of damages, to give in evidence any quarrel between the plaintiff and defendant at the time the plaintiff gave evidence, or that he was under the influence of the party for whom he deposed, or that he was a man of ill fame in witness-bearing; but that what he swore upon the trial before the magistrate, was improper to go to the jury in mitigation of damages, or in any manner to justify the speaking the words upon the plea aforesaid." Whereupon the defendant filed a bill of exceptions. Verdict and judgment for the plaintiff for \$500 damages;—from which the defendant appealed.

Wickham for the appellant. The Court's opinion was

(a) *Chitty*, clearly against law. (a) If the plaintiff in his testimony had spoken ill of the defendant's character, or of the character of his wife, or of some near relation of his, would not evidence of this have been proper in mitigation of damages? Perhaps the defendant might have been sworn before the same magistrate, and his testimony might have been contradicted by that of the plaintiff. He might

(b) 6 *Bac.* then have said that the plaintiff was perjured. (b) This is a supposed case; but we cannot introduce any other; for the judge would not let us shew what the case was.

(c) *Wirt contra.* A Bill of Exceptions is the joint act of the Court and Counsel. The only opinion given is that, on the plea of *not guilty*, the defendant could not give the

(c) *Under-* truth of the words in evidence by way of mitigation. (c) The defendant should have stated, in the bill of exceptions, for what purpose he wanted to introduce the testimony, if it was not to prove the truth of the words.—

wood v.
Parks, 2
Stra. 1200;
3 Schwyn
1066.

That appears to be the only object, according to this Bill of Exceptions.

OCTOBER,
1817.

Grant
v.
Hover.

Wickham in reply. The opinion of the judge certainly went to exclude all evidence to shew *what it was* the plaintiff swore to; and this was wrong. It is not said in the bill of exceptions, that the defendant offered to prove that the plaintiff was *perjured*. His object in putting the question to the witness is not stated.

Judge ROANE delivered the Court's opinion.

The Court is of opinion that, altho' it might have been improper to have permitted the appellant, in this case, to prove the *falsity of the words* charged to have been sworn before the magistrate, and thus, upon the plea of not guilty, to fix upon the appellee *indirectly* the charge of perjury, it was competent for the appellant to draw from the witness *what those words were*, in mitigation of damages: it being evident that the character of the words in question may have had a tendency to mitigate or aggravate those damages.

The Judgment is, therefore, to be reversed, and a new trial granted, in which the question propounded by the appellant, is to be answered, if requested.

Arnold against Hickman.

Decided
Nov. 1, 1817.

THIS was an action of *assumpsit* brought by *Adam Hickman*, against *George Arnold*, and *James Arnold*, in the County Court of Harrison. The declaration contained the following allegations:—
1. A contract under seal, for valuable consideration,

ought not to be avoided on the ground that a party was intoxicated at the time, if his assent was afterwards given, when not disabled by intoxication or otherwise.

2. It seems that intoxication is not a sufficient ground for vacating a party's assent to a contract, unless he was so drunk as to be incapable of business.

3. If a judgment of a county court be assigned, and afterwards reversed by the Superior Court of law, the assignee may thereupon sue the assignor, without carrying the case to the Court of Appeals.

4. *Assumpsit* may be brought against the assignor of a judgment, afterwards reversed;—notwithstanding the assignment was by a sealed instrument; for, in such case, the sealed instrument is not the ground of the action, but only inducement thereto.—See *Baird v. Biagrove*, 1 Wash. 170-172.

Newsman,
1817.

Arnold

v

Hickman.

ed sundry general Counts, for money had and received &c.; also a special Count upon an assignment to the plaintiff by the defendants, "*sealed with their seals*," of part of a judgment, of the same County Court, in their favour, against *Edward and John Jacksons*, which judgment was afterwards reversed by the Superior Court of law, "whereby the said sum of money and interest "could not, nor could any part thereof, ever be had, collected or received, by the said *Adam*, or to his use, by "virtue of the said judgment."—*James Arnold* pleaded separately, *non assumpsit*; and a Writ of Enquiry of damages was awarded against *George Arnold*; whereupon, a Jury being impanelled, the defendant *James* demurred to the evidence, the whole of which on both sides was set forth in the demurrer; consisting of, 1st, the record of a Judgment obtained by the plaintiff *Adam Hickman* assignee of *Isaac Lefever* against *George Arnold*, and several Writs of *Ca. sa.* thereupon, by virtue of one of which the latter was taken in execution, and confined in the prison bounds;—2. The record of the judgment in favour of *James and George Arnolds* against *John and Edward Jacksons*, and of the reversal thereof by the Superior Court;—3. The assignment by the said *George and James*, in the following words: "Harrison County, to wit, March 20th "1813. For valuable consideration to us in hand paid, "we authorise the Clerk of Harrison county to endorse "as much of the Judgment, obtained by *James and George "Arnold* at the March Term 1813, against *Edward Jackson* and *John Jackson*, as will pay eight hundred dollars, with interest from the date, to *Adam Hickman jr.*, "and that out of the first money that can or may be collected from said judgment. Given under our hands and "seals this day above written;" signed, sealed, and attested by three witnesses, two of whom proved its execution:—4. parol evidence, proving that the said assignment was made to *Adam Hickman* the plaintiff, in consideration of his releasing *George Arnold* from the prison bounds, (for whom *James Arnold* was one of the sureties,) and also discharging the said *George* from some other claims he had against him;—that, at the time of the assignment, *James Arnold* was intoxicated; but whether to

such degree as to render him incapable of transacting business, appears doubtful;—that, afterwards, “when he was not very much intoxicated, but in a condition to do business,” he declared himself satisfied with what he had done, that the transfer was good, and that *Hickman* would get his money:—that, before, and also at the time of executing the instrument of assignment, *James Arnold* repeatedly declared his unwillingness to make himself liable that he would sign it; if it would not have that effect; “that he did not intend to be liable on the assignment, but only to give *George* the right to the judgment to the extent mentioned.” The Jury found a verdict for the plaintiff, subject to the Court’s opinion upon the demurrer, which being argued, judgment was pronounced according to the verdict; and that judgment being affirmed by the Superior Court, the defendant *James* appealed to this Court.

NOVEMBER,
1817.

Arnold
v.
Hickman.

Call for the appellant, to shew that a deed executed by a drunken man is void, quoted *Buller’s N. P. 172*, citing *Cole v. Roberts*, in which it was decided that intoxication may be given in evidence on the plea of *non est factum*; also *Reynolds v. Waller*, 1 Wash. 164, and *Wigglesworth v. Store*, 1 H. & M. 70. He contended that *James Arnold* was incapable of business when he executed the assignment, and never meant to make himself personally liable for the judgment.

Wickham contra.—The argument that *James Arnold* was intoxicated; would have been proper before the jury; but this question was wrested from them by the Demurrer to the evidence. Is it competent to a man to do this, where the evidence is doubtful and contradictory? (a) The Court is not the proper tribunal to weigh the testimony. A party demurring to Evidence, must admit every inference that may be drawn from it by the Jury;—(b) that is, the testimony must be taken most strongly against the party demurring.

(a) *Harri-
son v. Brack*,
1 Munf. 22.

(b) *Stephens
v. White*, 2
Wash. 210.

“The testimony is contradictory as to *James Arnold’s* drunkenness.—Parsons addicted to intoxication are not a privileged class.—He obtained the benefit of the construction his side; for his brother was discharged from custody.—Intoxication is no plea, unless the party was

NOVEMBER,
1817.

Arnold
v.
Hickman.

so drunk, that, although bodily present, he was mentally absent.

Call in reply.—No conclusion can be allowed from the evidence demurred to, but such as fairly may be drawn. There is no contrariety in the testimony as to the fact of intoxication.

Some other objections occur to the claim of the appellee.

1. The reversal of the judgment against the Jacksons, may itself be reversed. A full Court here, has awarded a *Supersedeas* to the Judgment of the Superior Court. . .

2. *Assumpsit* did not lie in this case, but Covenant or Debt; the contract being under seal.

Wickham. The decision which reversed the judgment of the County Court was sufficient to authorise this action, whether such reversal was right or wrong.

2. The sealed instrument of assignment was not the ground of the action, but only inducement thereto.

Judge ROANE delivered the Court's opinion.

The Court affirms the judgment of the Superior Court affirming that of the County Court, on this ground,—that the *invalidity* of the judgment agreed to be assigned, does not appear to have been in contemplation of the appellant at the time of the contract, but that all his objections to engaging in that contract had relation only to the insolvency of the Jacksons;—and on the further ground, that his assent to the contract, thus understood, was given when he was not disabled, from contracting, by intoxication or otherwise.

Decided
Nov. 4, 1817.

Keys against M^r Fatridge.

1. If a militia man employ and pay a substitute

After a verdict for the plaintiff in *assumpsit*, for \$102 damages, the defendant moved for a new trial, and, his

to perform his tour of duty, and *thereupon he discharged by the commanding officer*, he cannot recover back the money paid, upon the ground that the defendant, after repairing to the place of rendezvous, and commencing the march, was discharged as a supernumerary, and therefore never performed the tour of duty.

2. Upon the Court's overruling a defendant's motion for a new trial, if he file a bill of Exceptions to such opinion, stating all the facts proved to the jury, from which it appears that, upon the *merits*, the plaintiff ought not to recover, the judgment ought to be reversed, and a new trial granted.

NOVEMBER,
1817.

Keys
v.
M^r Patridge.

motion being overruled by the Court, filed a Bill of Exceptions, stating that, "upon the trial of this cause, the plaintiff to support his action, proved, that he was enrolled in a company of militia in Washington County; that, in the year 1813, part of the militia of said county were called for by the constituted authorities for the purpose of defending Norfolk, a town about 430 miles distant from said County of Washington; that the number required from the Company to which the plaintiff belonged were detailed; but there being a deficiency in a volunteer rifle company belonging to the 70th Regiment, a draft took place, by order of the commanding officer, to supply the said deficiency, when the plaintiff was drafted and taken as one of the said rifle company, and put upon the first requisition, which was to march in a few days;—that the plaintiff, shortly after this, delivered to the defendant a horse worth \$65, and \$62 in cash, to go as a substitute, and perform his the said plaintiff's tour of duty to Norfolk, according to an agreement then made between them; that the defendant made preparations to perform for the plaintiff said tour of duty as his substitute, at considerable expense; and was received by the Court Martial as a substitute for the plaintiff; and the proper officer, in consequence thereof, gave the plaintiff a regular discharge from performing said tour; that, a few days after this, the said militia composing the first requisition were ordered to march, and the defendant, pursuant to said orders, marched, with the rest, to the seven mile ford, a few miles distant from the place of rendezvous, at which place the Lieutenant Colonel of said County of Washington, being the commanding officer, finding that he had more men than had been required, the said troops by his order drew lots, to designate the soldiers who should return to their homes; that the defendant was one of those who drew to return home, and the proper officer thereupon gave him a discharge from performing said tour of duty; and the defendant thereupon returned home, and did not go any farther with said troops; which was all the evidence given in support of his claim on either side."

Stevenson,
1817.

Keys
v.
McFtridge.

Judgment being entered according to the verdict, the defendant appealed to this Court.

Wickham for the appellant.

Stevenson for the appellee.

Judge *Roane* pronounced the Court's opinion, that, upon the merits, as disclosed in the bill of exceptions, the appellee had no right to recover.

The Judgment was therefore reversed, and a new trial granted.

Stott and others against Baskerville and others.

Decided,
Nov. 5, 1817.

Stott and others against Baskerville and others.

1. Where the Bill in Chancery is defective, not only for want of proper parties, but in other respects, so that no decree for the plaintiff can be entered, a decree dismissing the Bill altogether, ought to be affirmed:—but, if it appear probable that something might be recovered upon a new bill properly drawn, such affirmance should be without prejudice to any cognizable at law; and also claimed the land as purchasers, without notice, from *William Gadberry*, to whom it was patented, June 25th, 1787.

The appellants as co-heirs of *William Kennon*, filed a Bill in the Superior Court of Chancery for the Richmond District against *Baskerville* and others, stating that *Kennon*, in December 1767, executed a deed of trust to *Baker* and others, upon certain property, including a tract of land called the Copper Mine tract, of 4900 acres, in Buckingham, which was, afterwards, in May 1790, re-surveyed and patented to the said *Baker* and others, for the purposes of the deed of trust; by the terms of which, the said tract of land was not to be resorted to, unless absolutely necessary;—that it was not necessary to resort to the said land, which had descended to the complainants as co-heirs of *Kennon*; that *Baskerville* and others had, upon pretences unknown to the complainants, taken possession of sundry parts of the land; and therefore the prayer of the Bill was to recover the possession; for an account of the profits; and for general relief.

The defendants by their answer excepted to the jurisdiction of the Court, because the matters in the Bill were not cognizable at law; and also claimed the land as purchasers, without notice, from *William Gadberry*, to whom it was patented, June 25th, 1787.

It appeared by Exhibits, that a Patent for the Land actually issued to *Gadberry* on that day; and that the de-

Indents had deeds from him: that the survey, for *Baker* Newman,
1817.
and others the trustees aforesaid, was made in June 1768,
and the Patent to them issued May 15th 1790, reciting,
"that *James Christian* had made a survey of 5100 acres,
"which *William Kannon* had created, and obtained, on
"the 6th of June 1768, a judgment of the Council in his
"favour, with an order that a patent should issue to him."

The deposition of *John Patterson*, Surveyor of Buck-
ingham, proved, that he surveyed the land for *Gadberry*,
some years past; and, at that time, *Gadberry* and *Bas-*
kerville informed him it was called *Kannon's Mine Tract*.

A Memorandum from the Land Office was produced in
the following words. "6 June 1768. Grant to *Wm. Kin-*
non Lands now in Buckingham. Find no grant in the
"name of *Wm. Kannon* from 1764 to 1774. *John Daven-*
"port, Clerk."

Chancellor *TAYLOR* dismissed the Bill; and the plain-
tiff appealed.

Call for the Appellants.—The decree is erroneous, 1.,
because the judgment on the *Quest*, and the Deed of
Trust, (which was duly recorded,) were implied notice
to *Gadberry* and those who purchased under him; and
therefore the patent to him, and the deeds to the persons
who purchased under him, were void against *Kannon* and
his heirs;—and 2., because the name, and general noti-
sistency of the land, were likewise notice, which affected
Gadberry and the purchasers from him.

In *Meredith v. Cawm and wife*, 2 *Munf.* 257, it was de-
cided that the inchoate right to a Patent, obtained by a
decision in favour of a *Creator*, is not barred by length
of time.

Witham contra. This case presents no real difficul-
ty. The circumstances are stronger in favour of the ap-
pellees, who claim by the prior patent, than those by
which such patent prevailed in *Noland v. Cromwell*, 4
Munf. 155, and *Gooseman v. Martin*, *Ibid.* 583.

Such a Bill as this of the appellants, can furnish no
foundation for a decree.—There is no allegation that
Kannon ever was in possession, or that he, or any claim-
ing under him, ever set foot on the land. When *Gad-*
berry made his entry, it appeared waste and unappropri-

Mooreman,
1817.

Beatt and
others

of
Beakerville
and others.

ated. How was *he* bound to take notice of the proceeding before the Council, upon *Kennon's Caveat* against *Christians* in the year 1767?—If *he* was so bound, was not *Kennon* equally bound to take notice of *Gadberry's* proceeding to get his patent?—He should have evicted *him*, according to the decision in *Noland v Cromwell*.—Even if *Gadberry* had known of the judgment in 1767, he had reason to believe the claim abandoned, since *Kennon* had taken no steps to get a grant, and had not taken possession;—but if *he* had notice, the present appellants are entitled to protection; they being purchasers without notice.

In *Norrell v. Ceman*, there were various features distinguishing that case from this; particularly, continued possession by the party in whose favour the old judgment was.

Another defect in the Bill is, that the Trustees are not made parties. This in fact is nothing more than an *Ejectment* brought in *Chancery* by the *cestui que trust* against a third person, praying that he may be turned out of possession;—alleging satisfaction of the Deed, and a resulting trust in favour of the plaintiff. Surely the suit should have been against the Trustees.

Different parcels are held by different defendants:—yet, by this proceeding, they are all joined in one *Ejectment*, and made to defend each other's titles.—This too is wrong.

Wirt in reply. This is not an *Ejectment* in *Chancery*. The legal title was in the trustees, not in the complainants, who therefore could not bring *Ejectment*, but were driven to a Court of Equity for relief. If proper parties were not made, the chancellor should not have dismissed the Bill, but granted leave to amend it; whereupon, if such amendment had not been made, the Bill might then have been dismissed.

The cases of *Noland v. Cromwell*, and *Gooseman v. Martin*, did not relate to ancient claims under Orders of Council, but only to claims under the Land Law of 1779.—The Orders of Council were kept alive by Acts of Assembly, repeatedly, giving time to make surveys upon them. *Gadberry* therefore had no right, by his Entry, to prevent the appellants from getting the advantage intend-

ed for them by these Acts. It is evident that, when he made that Entry, he knew of Kenson's previous right, and ought to have given him, or his heirs, notice; if which had been done, a *Caveat* might have been filed.

The Memorandum from the Land Office seems to imply that a *Grant* was issued to Kenson, which now cannot be found.

The Decree ought to be reversed, and cause sent back, for new parties, and, I hope, with leave to make other amendments to the Bill.

Washington. Where the statements in the Bill are so defective that the Court cannot decree upon it, such defect is not cured by the additional defect of the want of proper parties. The Court should affirm the decree, because the Bill was properly dismissed:—but the course in such case is, that if it appear probable that something may be recovered, by a new Bill stating the case properly, the Court will add a clause declaring, that such affirmance shall be *without prejudice* to any new suit that may be brought to recover the property in controversy.

Judge ROANE pronounced the Court's opinion.

On consideration of this case, the Court is of opinion to affirm the decree:—but this affirmance is to be without prejudice to any other suit the appellants may be advised to bring.

Norman,
1817.

Stett and
others

v.
Baskerville
and others.

Winn against Bowles.

Decided,
Nov. 6, 1817.

THIS was a suit in the Superior Court of Chancery for the Richmond District, brought by *Thomas Winn*, *Jnr.* against *Benjamin Bowles*, administrator of *Mary Bowles*, deceased, and *Augustine Bowles*, defendants;—for an account of the assets of the said decedent, and to recover (among other claims) the principal and interest of a Bond for 48*l.* 1*s.* 3*d.*, executed by the said *Mary Bowles*, in her life time, to *John Winn* executor of *Heze-*

1. The right of the assignee of a bond to demand payment thereof in a Court of Equity, which existed before the Statute authorising him to sue at

law in his own name upon the assignment, is not impaired by that Statute; but the latter remedy is cumulative and additional to the former.

November, 1817. *Winn* deceased, and by the said executor assigned to the plaintiff.

Winn
v.
Bowles.

The cause being heard, on the Bill, Answers and Exhibits, an account was directed to be taken, of *Benjamin Bowles's* administration of the estate of *Mary Bowles*;—in pursuance of which order, a Commissioner made two statements; one shewing a balance of \$248 34; the other, of \$103 34; due the estate, the 1st of January 1812.—But, on a farther hearing, the Bill was dismissed with Costs; from which Decree the plaintiff appealed.

William Hay, jr. for the appellant. The Chancellor, instead of dismissing the Bill, should have adopted one or the other of the Commissioner's statements, both of which shewed assets in the defendant's hands. The first statement ought to have been preferred, for the reasons given by the Commissioner.

The plaintiff was not bound to go into a Court of law, in the first place; for Equity has concurrent jurisdiction in the administration of legal assets. The origin of this jurisdiction is not material; if it be established by precedents;—but it's origin will shew that the creditor is let into the Court of Chancery in the first instance. The practice, originally, was to file a Bill for discovery only, of assets; but, as that could not be had without an account, the Court proceeded to direct the account; and, (to prevent multiplicity of suits,) went on to make a complete decree, giving the party his debt likewise.^(a) So firmly settled is this jurisdiction, that, when once a decree *quod computet* is made, the Court will not permit a

(a) *Jesus College v. Bloome.* 3 Atk. 263; *Alexander v. Alexander.* 2 Ch. cases, 37; 11 *Viner* 243; *Morrice v. Bank of England.* Cases Temp. Talbot, 220.

(b) *Largan v. Bowen.* 1 Sch. & Lef. 299; *Wortley v. Birkhead.* 2 Vezey, 571; *Martin v. Martin.* 1 Vezey, 211; *Brooks v. Reynolds.* 1 Bro. C. C. 183; *Goate v. Fryer.* 3 Bro. C. C. 23; *Hardcastle v. Chet-til.* 4 Bro. C. C. 163.

creditor to proceed at law.^(b)

Wirt contra. A simple action of debt on a Bond cannot be brought in equity. There is no averment in this Bill, of any deficiency of assets, or difficulty of getting at them. No proof is adduced, of any of the plaintiff's claims, except the bond. The cause was heard on bill and answer only, without replication.

Hay in reply. Upon examining the authorities, the Court will find they fully support my position. The jurisdiction of Courts of Equity has generally been obtained by usurpation upon the Courts of law. The case of Dower is an example. The Court of law can in that case give relief;—yet it is given in Equity.

In this case, the other claims in the Bill, (exclusive of the bond debt,) being proper for equitable jurisdiction, will draw to them the jurisdiction as to the bond debt also.

NOVEMBER,
1817.

Winn
v.
Bowles.

Judge ROANE pronounced the Court's opinion.

The objection to the jurisdiction of the Court of Chancery in this case is overruled, on this ground, (without deciding on any other,) that the pre-existing right of an assignee of a bond, to demand payment of the same in a Court of Equity, has not been merged, or impaired, by the statutory right, since given him, to sue at law, upon the assignment, in his own name;—but that the latter remedy is cumulative and additional to the former.

The Decree is therefore reversed, with costs, and the cause remanded to be proceeded in upon the reports returned in the cause.

Gregory against Jacksons.

Decided,
Nov. 8, 1817.

IN Ejectment, the declaration was, for "ten Messuages, twenty cottages, one thousand acres of woodland, one thousand acres of arable land, one thousand acres of meadow and one thousand acres of pasture, lying and being in the County of Mecklenburg," without setting forth any boundaries.—The verdict was, "We of the Jury find for the plaintiff his term yet to come in four hundred acres of land part of the premises in the declaration mentioned, and in the possession of the defendant," &c.—with no farther description. Judgment being rendered for the plaintiff, the defendant obtained a *Supersedeas* from this Court.

Wickham for the plaintiff in error. The verdict is so uncertain that the Sheriff could not deliver possession of the land recovered. The very point is decided in *Clay v. White*, 1 *Munf.* 162.

Bouldin contra. There is a difference between the Verdicts, in that case, and this. The verdict now in question is not to be distinguished from a general one.—Though the declaration demands a thousand acres, yet,

1. A verdict in Ejectment, finding for the plaintiff, in general terms, a certain "number of acres part of the premises in the declaration mentioned," without designating the boundaries of such part, or referring to some certain standard to supply such defect, is too uncertain to warrant a judgment upon it.

NOVEMBER,
1817



Gregory
v.
Jacksons.

(a) *Cot-*
tingham v.
King, 1
Burr. 629;
Connor v.
West, 5 Burr.
2673.

if four hundred only are really in controversy, a general verdict is sufficient.

Such certainty as will enable the Sheriff to deliver possession, is not required in Ejectment; for the lessor of the plaintiff is to shew the Sheriff the land, and take possession at his peril. (a) Suppose, the declaration had demanded "four hundred acres *part* of a larger tract," and the Jury had found a general verdict, a Judgment upon it could not have been set aside. The verdict in this case is in the same words with such a declaration and verdict.

The case of *Clay v. White* was on a *special* verdict, in which greater particularity is required than in general verdicts. In that case too, it was uncertain whether the plaintiff was entitled to recover at all. It did not appear *who* was in possession of the ninety acres, or against *whom* the plaintiff was to recover.

Was it ever demanded of a plaintiff in Ejectment, upon a declaration mentioning only a certain *number of acres*, that he should shew in what part of the defendant's possessions they lay?

Wickham in reply. The Jury have said that the plaintiff is entitled to his term yet to come in 400 acres *part* of the premises in the declaration mentioned. I say *what* part?

This is not a general Verdict. If the suit were for an *undivided moiety*, and the Jury found the plaintiff entitled to an *undivided tenth part*, there would in such verdict be no uncertainty. But in this there is. There should have been an Order of Survey, and a finding by metes and bounds. The cases in *Burrow* are cases of general Verdicts, for *whole* tracts. There is no case where such a verdict as this has been supported.

Where the declaration is so defective, *as that no judgment can be entered upon it*, I think that even the act of Jeofails can not cure it. Here the defect is not in the Verdict only, but the declaration; and not in *form*, but in *substance*.

Judge ROANE pronounced the Court's opinion, that the Verdict in this case is too uncertain to warrant a judgment for the appellee;—in this, that it does not suffi-

ently designate the boundaries of the 400 acres of land, which they find for him, nor refer to any certain standard by which that defect may be supplied. The Judgment is therefore to be reversed, and a venire de novo awarded

NOVEMBER,
1817.

Muse executor of Heffernan against Vidal. Decided, Nov. 8, 1817.

THE declaration in this case was in the following words:—Middlesex County, to wit:—“ William George Vidal complains of Henry Heffernan in custody, &c. of a plea, for that the plaintiff, on the 22d day of December 1807, at the County aforesaid, was possessed of seven negro slaves, named &c., of the price or value of 700*l*, and claimed the said negro slaves to be his own proper slaves; and the defendant knowing that the plaintiff was possessed of the said negro slaves, and claimed the same as his own slaves, and the defendant knowing that the plaintiff did not conceal the fact of the said slaves being in his possession; yet the defendant, acting in the character or office of a Justice of the peace for the County of Middlesex aforesaid, on the 22d day of December 1807, at the County aforesaid, did, maliciously and corruptly, and with the intent to injure and oppress the plaintiff, and without probable cause, issue his certain writing directed to one Nelson Stamper, Constable, or any other Constable of the said County, whereby he stated, that an information, on oath, from John Roane adm’r. of Thomas Roane deceased, that Judy a negro woman, Martha, Seana, Noah, Caty and two other children had, within ten days then last past, been feloniously taken, stolen and carried away out of the possession of said John Roane administrator, from the plantation of George Daniel deceased, in the county aforesaid, and that the said John Roane had probable cause to suspect, and did suspect that the said negro slaves were concealed in the house or houses of William George Vidal of Urbanna, and of the said County, labourer, and that therefore, in the name of the Commonwealth, he authorized and required him with ne-

1. Trespass *vi et armis*, and not case, is the proper action, against a Justice of the peace, for maliciously & corruptly, with intent to injure and oppress, and without probable cause, issuing a Search warrant, by virtue whereof a Constable forcibly enters the plaintiff’s close, and takes and carries away from his possession certain slaves which he held as his property.

2. The form of the declaration in such action.

NOVEMBER,
1817.

Muse ex'r of
Heffernan
v.
Vidal.

“ cessary and proper assistance to enter, in the day time,
“ into the house of the said *William George Vidal*, and
“ there diligently to search for the said slaves, or any
“ part thereof. and if the said slaves, or any part there-
“ of, should be found upon such search, that he should
“ bring the same, and also the body of the said *William*
“ *George Vidal* before him or some other justice of the
“ peace for the said County, to be disposed of and dealt
“ with according to law, by virtue of which said writing
“ the said *Stamper* did forcibly enter the close of the plain-
“ tiff in the County aforesaid on December 23d, 1807,
“ and did take and carry away, out of the possession of
“ the said Plaintiff, the said negro slaves, named &c.,
“ and delivered the same into the possession of the de-
“ fendant, who, thereafter, on the same day at the Coun-
“ ty aforesaid, delivered the same into the possession of
“ the said *John Roane*, to the great injury of the said
“ plaintiff, and against the peace and dignity of the Com-
“ monwealth, whereupon the said plaintiff saith that he
“ is injured and hath damage to the value of 1000*l*.; and
“ thereof he brings suit &c.”

A demurrer to this declaration was filed, and afterwards withdrawn. The cause was tried, in the Superior Court of law, on the plea of *not guilty*, and a Verdict found for the plaintiff for 36*l*. damages;—subject to the Court’s opinion upon certain points reserved, viz. whether the plaintiff had set forth in his declaration, *any* cause of action against the defendant; and if so, whether he could have remedy therefor in *this* form of action.—The defendant died after the verdict, and, by consent, the suit was revived against *Elliot Muse* his administrator; after which the Court, being of opinion that the law was for the plaintiff on the points reserved, entered judgment for him, whereupon the said administrator obtained a *Supersedeas*, from this Court.

In the petition for the *Supersedeas*, it was contended that, “ if the defendant was liable to any action at all, it ought to “ have been *Trespass*, and not *Case*; and therefore the de- “ fendant’s demurrer ought, for that cause, to have been “ sustained. 1 *Chitty*, 137.

The parties being called, and not appearing, Judge **NOVEMBER, 1817.**
ROANE pronounced this Court's opinion:—

The Court considers this action as an action of *trespass vi et armis*; and, thus considering it, affirms the judgment.

Duval's Executor against Trent's devisees and others. Decided, Nov. 11th 1817.

WILLIAM DUVAL surviving executor of *Robert Duval* filed his Bill in the Superior Court of Chancery for the Richmond District against the sons and heirs of *Peterfield Trent*, the devisees and executors of *Alexander Trent* deceased, *Richard N. Venable* a debtor of *Peterfield Trent*, and other defendants. The object of the suit was to get satisfaction of two judgments obtained in the General Court, by the executors of *Robert Duval* against *Peterfield Trent* in his life time; whereupon, Executions being issued against his body, his brother *Alexander Trent* became his surety in two bonds for his keeping within the prison bounds, in which *they bound themselves and their heirs*:—those bonds were forfeited by the said *Peterfield Trent's* escaping from the bounds, and judgments were obtained upon them, in the County Court of Cumberland, against the executors of *Alexander Trent*, the surety; but no executions were issued upon these judgments. The Bill stated that *Peterfield Trent* died intestate, without any personal estate, and much involved in debt, and that no person had taken out administration; but that he left real estate more than sufficient to pay off the judgments in question:—that there were no assets of *Alexander Trent* deceased, on which executions could be levied; that the said *Alexander Trent* devised sundry lots of land to be sold by his executors for payment of his debts, and also devised lands to his children:—that the defendant *Venable* acknowledged himself to be a

1. A creditor, having obtained judgment against the executors of the surety for the debt, is not bound to take out execution, before he can file his Bill in equity, for an account of the personal and real estates of the principal and surety, and to get satisfaction out of the real, in default of the personal assets.

2. Under what circumstances, such Bill may be filed (See also *Foster & wife v. Crenshaw's ex'ors.* 3 Munf. 514.)

NOVEMBER, 1817
 Duval's Ex-
 ecutor
 v.
 Trent's De-
 vices and o-
 thers.

debtor of *Peterfield Trent*, in the sum of 100*l.* at least, and was willing to pay the same under the direction of the Court. The Complainants therefore prayed an account of the personal and real estates of *Peterfield* and *Alexander Trent*s; a decree directing their claims to be satisfied out of the real, in default of the personal property, and payment to be made to them of the money in *Venable's* hands.

After answers filed, and sundry proceedings in the cause, Chancellor TAYLOR dismissed the Bill;—"being of opinion, that the plaintiff's coming into equity before executions were sued out upon the judgments of the County Court of Cumberland, filed among the exhibits, was premature."

Nicholas for the appellants. There are several reasons for giving the Court of Equity jurisdiction in this case; 1. as to *Peterfield Trent's* estate; a discovery of assets is called for by the Bill. (a) There was no representative of the personal estate, the same being so obviously insolvent that no person would administer; which is admitted by the answer of the children. The suit was brought in equity to charge the real estate. Conflicting claims of mortgagees were also to be adjusted; and the Court of Chancery delights to prevent circuity of action.

2. As to *Alexander Trent's* estate. The Bill charges a deficiency of personal, and a devise of real estate to pay debts. The Executors by their Answer refer to an Account of the assets which came to their hands, taken by a Commissioner in the suit of *Hill v. Archer and others* in the same Court. The Chancellor ought either to have been satisfied with that Account, or directed another to be taken.

Peterfield Trent was the real original debtor. A Court of Equity ought not to compel a Creditor to go against a surety for satisfaction. Because we had got judgments against the executors of *Alexander Trent* the surety, the Chancellor decided that we were bound to look to those judgments, though we filed this Bill endeavouring to get satisfaction out of the principal. This was against the

(a) *White, Whittle & Co, v. Bannister's ex'ors.* 1 Wash. 168.

principles of Equity, and a *harsh* application of the rule that relief will not be given in Chancery when it can be had at law.

3. A final decree should now be directed, as to the money appearing by *Venable's* answer to be in his hands. If not, the Court ought not to dismiss the Bill, but to send the cause back for farther proceedings.

William Hay, jr. for *Alexander Trent's* executors. I should be glad if the Court would make such decree as *Mr. Nicholas* suggests.

Judge ROANE pronounced the Court's opinion.

The Court is of opinion, that the Decree dismissing the Bill is erroneous;—and that, instead thereof, the Court of Chancery should have decreed to the appellant, as Executor, the sum admitted by the defendant *Venable* to be due to the estate of *Peterfield Trent* deceased; subject, however, to any preferable claims thereto which may exist in favour of any other creditor or creditors of the said *P. Trent* deceased, and under such conditions, to ensure the eventual forthcoming of the same, as to the said Court might seem proper. The Court is farther of opinion, that, as to the residue of the sums now in controversy, an account should have been taken of the personal and real estates of *P.* and *A. Trents* respectively, and that as much thereof as is not bound by superior claims should have been held liable to make good the same; applying the personal estate, if any, in the first instance.

The Decree is therefore reversed with costs, and the cause remanded, to be finally proceeded in pursuant to the principles of this Decree.

NOVEMBER,
1817.

Duval's
executor
v.
Trent's
devisees and
others.

Decided,
Dec. 3, 1817.

Bragg and others against Murray.

A motion for judgment on a forthcoming bond, in the obligatory part whereof no penal sum is mentioned, can not be sustained; but such bond, with the execution on which it was founded, may be quashed, on a motion for that purpose.

A forthcoming bond was taken, without any penal sum mentioned in the obligatory part; but with a condition in the usual form. A judgment was obtained upon it in the County Court, and affirmed in the Superior Court, to which a Writ of Supersedeas was granted by a Judge of this Court.

Upon inspection of the Record, (without argument,) the Court's opinion was pronounced by Judge ROANE, as follows.

The Court is of opinion, that the judgments of both Courts are erroneous, in this; that the paper on which the judgment was rendered, was not a bond, such as would justify the motion under the Act of Assembly; there being no sum mentioned in the penal part thereof; and that the same, with the execution on which it was founded, ought to have been quashed, if a motion for that purpose had been made. The Judgments of both Courts are therefore reversed, and the motion dismissed.

Decided,
Dec. 4, 1817.

Gee against Hamilton and wife.

1. The SUSANNA HICKS obtained judgment against *Charles Gee* in Lunenburg County Court, March 14th, 1789, and immediately took out a *fi. fa.*, on which the return was "*no effects.*" She afterwards married *Hamilton*, and they sued out a *sci. fa.* on the judgment, April 24th 1812. The defendant pleaded, *no such record*, and the *act of limitations*. To the first plea. the plaintiff replied, *there is such a record*; concluding to the Court:—to the second, that a *fi. fa.* was sued out on the judgment in more than ten years elapsed between the return of the execution, and date of the *scire facias*.

2. Issues being joined on the pleas of *no such record*, and the Act of Limitations; if the Jury find for the plaintiff on the second plea, and the Court, *without taking any notice of the first plea*, enter judgment; such judgment ought to be reversed;—notwithstanding, on previous pleadings, (which by consent were set aside,) the Court had pronounced that, in fact, there was such a record.

March 1789, and returned "*no effects;*" but it did not conclude to the Court or the Country, and no issue was joined upon it. The record being inspected, the Court decided the issue on the first plea in favour of the plaintiffs, and then a jury was sworn, whose verdict was that the act of limitations was not a bar to the *sci. fa.*; and judgment was entered for the debt &c.

DECEMBER,
1817.

Gee.
v.
Hamilton &
wife.

The defendant appealed to the Superior Court of law; from which, by consent, the cause was sent back, for new pleadings. The same pleas and replications, as before, were again filed, and issue joined on them: and, a verdict being found for the plaintiffs on the second issue, the Court without taking any notice of the first issue, gave judgment for the plaintiffs.

A question of law was made, at both trials, in the County Court, whether, under the circumstances of this case, the act of limitations was a bar? The County Court decided that it was not. The defendant excepted and appealed to the Superior Court, where, the last mentioned judgment being affirmed, he appealed to this Court.

Leigh for the appellant, admitted that the Act of Limitations, (Rev. Code of 1792, ch. 76. § 5,) was not a bar to the *scire facias*. The Act is so explicit as not to admit of doubt or argument. But it is equally clear, that, while the plea of *no such record* remained undisposed of, the County Court could not give judgment; and, for that cause, both judgments ought to be reversed.

Bouldin contra, said, that, though the issue on the plea of *no such record* was not formally disposed of, yet, as it sufficiently appeared that there was such a record, the judgment ought not to be reversed for so trivial an oversight.

This Court was of opinion, that both judgments were erroneous in this, that the plea of *null tiel record* had not been tried. Both were therefore reversed, with costs, and the cause remanded, for trial of that issue, to be had in the County Court.

Decided,
Dec. 6, 1817.

Dunbar against Buck and others.

1. A shipper of corn having agreed to deliver it on board with no unreasonable delay; the Captain of the vessel applied for it on a Sunday, and, no person being ready to deliver it, would not wait 'till Monday, but went to sea without it.—The Ship owner was not entitled to dead freight on the quantity not shipped; but, on the contrary, was bound to make compensation to the other party, for the loss sustained, in consequence of the Captain's not taking the full quantity on board.

2. Altho' a person having a claim against a mercantile Company, can not set off such claim, against a debt from himself to one of the partners; yet it is competent for him to charge that partner, in equity, (in extinguishment of the said debt,) for so much of the surplus of the partnership property, as may be due to such partner on a settlement of the partnership accounts; for the purpose of which settlement, and also for that of ascertaining and adjusting his own claim against the company, all the partners should be made defendants to his Bill.

UPON a Bill of Injunction exhibited by *Robert Dunbar* against *Anthony Buck, David Henderson* and others, the material circumstances of the case, appearing from the Bill, Answers and Evidence, were the following:—

A contract was made in November 1807, between *Robert Dunbar* of Falmouth, and *David Henderson* of Fredericksburg, for the shipping of one thousand bushels of corn by *Dunbar*, in a Vessel belonging to *David Henderson* and Son, to be carried to the Island of Antigua, and there sold on his behalf. He had the requisite quantity at home, and put on board at Fredericksburg 679 bushels; but, having purchased about 500 bushels of a Mr. *John Skinker*, whose plantation called the Hop-Yard, lay some miles lower down the Rappahannock, and *Skinker* having urgently pressed him to take it away, he proposed to *Henderson* that the vessel should take in the balance of the 1000 bushels, at the Hop-Yard; to which the latter agreed, but said he should expect the Vessel would meet no unreasonable delay. To guard against this, *Dunbar* on a Saturday afternoon furnished the Captain with bags to hold the corn; and, expecting the Vessel to drop down the River on Sunday, and receive it on Monday morning, sent his agent to have it measured and put on board at that time:—but the Captain, when he arrived at the Hop-Yard, finding the Overseer either absent, or unwilling to deliver the Corn on the Lord's day, proceeded on his voyage without it. When the Captain returned, with the account of sales, a charge was made against *Dunbar* for dead freight on 321 bushels of corn, as so much not delivered by him according to contract; which charge he considered highly unreasonable, and, on the contrary,

contended that *Henderson* ought to make him compensation for the loss in the sale, occasioned by the fault of his agent the Captain, in not taking on board the full quantity. *Henderson* insisted on retaining the dead freight, and refused to make good the loss.

Dunbar,
1817.

Dunbar
v.
Buck and others.

A Judgment having been obtained by *Anthony Buck* a broker, upon a flour contract made by him, (in his own name, but for the benefit of *David Henderson*,) with *Dunbar*; the latter, discovering the fact of *Henderson's* right to that judgment, filed his Bill of Injunction, to stay proceedings upon it, and to be allowed set-offs against it for the dead freight, unjustly (as he alledged,) retained by *Henderson*, and for the loss as aforesaid.

On his part, *Henderson* alledged that, when the vessel sailed, the Embargo imposed by Congress in December 1807, was expected, and therefore *Dunbar* bound himself to have the corn at the Hop-Yard delivered immediately, and without any delay; but this allegation was not supported; on the contrary, was refuted by the testimony. He farther remarked, that another unsettled account existed between *Dunbar* and him, upon which he was entitled to a balance remaining unpaid.

The cause being regularly set for hearing, Chancellor TAYLOR dissolved the Injunction, and dismissed the Bill; from which decree *Dunbar* appealed to this Court.

Wickham for the appellant.

Green for the appellees.

The following opinion of the Court was delivered by Judge ROANE.

The Court is of opinion, that, as the case now appears, the sum withheld from the appellant, as dead freight upon the corn in the proceedings mentioned, as also the amount of the loss sustained by him by the failure to take on board the residue of the corn agreeably to contract, (to be estimated under the direction of the Court of Chancery,) were proper Items to be set off against the judgment in question; and that, although these last mentioned sums were due by *David Henderson & Son*, and not by *David Henderson* individually, it is competent to the ap-

December,
1817.

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Dunbar
v.
Buck and o-
thers.

pellant, in equity, to charge the said *David Henderson* for as much of the surplus of the partnership property as may be due to him on a settlement of the partnership accounts, in extinguishment of the said debt; for the purpose of which settlement, however, (if required by the defendants,) and also for that of ascertaining and adjusting the existence and amount of the foregoing Items, the son of the said *David Henderson* ought to have been made a party.

The Opinion of the Court, therefore, is, that the Decree is erroneous in dismissing the bill, instead of having provided for such settlement and adjustment, and also for the adjustment of the private accounts between the parties. The same is therefore reversed with Costs, and the cause is remanded, in order to have the necessary party made as aforesaid, and be further finally proceeded in, pursuant to the principles of this decree.



Decided,
Dec. 1817.

Fox and Vowles against Mountjoy executor of Edwards.

1. In an action upon a Bond for prosecuting an Injunction to stay proceedings on a Judgment at law, for a debt bearing interest; which injunction is dissolved & the bill dismissed; the plaintiff is entitled to a verdict for

the amount of the principal sum with lawful interest to the time of finding such verdict, the costs at law and in Chancery, (costs being awarded to the plaintiff by the decree,) with damages on the said principal sum at the rate of ten per centum per annum, during the pendency of the injunction; although the condition of the bond be, for payment of the "judgment, and costs of the injunction (if ruled to be paid by the complainant,)"—without mentioning interest or damages.

THE Condition of an Injunction Bond was, "that, whereas the above bound *Nathaniel Fox* hath obtained an injunction in the Superior Court of Chancery for the Richmond District, to stay proceedings on a judgment at law lately obtained in the County Court of Stafford against him by the said *Thomas Mountjoy* Executor as aforesaid, now, if the above bound *Nathaniel Fox* shall well and truly pay and satisfy the judgment obtained against him at common law, by the aforesaid *Thomas Mountjoy* as Executor aforesaid; in case the injunction upon hearing should be dissolved,

“ together with the costs of said injunction, if ruled so
 “ to do, then the above obligation to be void, else to re-
 “ main in full force and virtue.”

DACUMASS,
 1817.

Fox & Yow-
 les
 v.

Mountjoy
 executor of
 Edwards.

Action being brought on this bond, in the County Court of Stafford, issue was joined on the plea of *condition performed*. At the trial, the plaintiff gave in evidence the bond, and a copy of the record of proceedings in Chancery shewing that, in fact, the Injunction was dissolved, and the bill dismissed, with costs:—whereupon, the defendants moved the Court to instruct the Jury that the plaintiff was not entitled, in this action, and under the condition of *this* bond, to damages at the rate of ten per centum, and other interest and Costs not contained in the terms of the said obligation; which the Court refused to do, and instructed the Jury “ that the plaintiff “ was entitled to recover interest on the principal, (exclusive of costs of judgment enjoined,) at the rate of “ six per centum per annum from the rendition of said “ judgment (1) until the said injunction was awarded, “ and from the dissolution of said injunction until the “ present time, and also damages, (2) at the rate of ten “ per centum per annum, on the said principal sum during the existence of the said injunction, and also the “ plaintiff’s costs in the Court of Chancery:”—to which opinion the defendants excepted.

Verdict and Judgment accordingly for the plaintiff.—Upon an appeal, the Judgment was affirmed by the Superior Court; and thereupon, the defendants again appealed.

After argument by *Briggs* for the appellants, and *Green* for the appellee, this Court also affirmed the Judgment.

(1.) Note. The judgment was for a debt bearing interest.

(2.) Note. See B. Code of 1819, c. 66. § 61. p. 209.

Decided,
Dec. 11th,
1817.

Hopkins and Watson against Ward and others.

1. The Common-wealth by Patent granted "a tract of land, containing 70,202 acres," (within specified metes and bounds,) by a survey containing a surplus of 42,000 acres, held by titles having legal preference to the warrants and rights upon which the grant was founded. A reservation was therefore made, in favour of those titles, in general terms. It was decided that, under the terms of this Patent, the Grantee was entitled to recover in Ejectment all the land within the metes and bounds thereof, except such as the defendants might shew themselves entitled to, under the said reservation.

THIS was an action of Ejectment in which the fictitious plaintiff *Aminadab Sackright* declared, with two Counts; in the first, as lessee of *Samuel M. Hopkins*, and in the second as lessee of *James T. Watson*; for the same land in each Count;—viz, "twenty messuages, twenty cottages, seventy thousand two hundred and two acres of wood land, and seventy thousand two hundred and two acres of arable land."

At the trial, the plaintiff, to support the issue on his part and under the first Count, offered in evidence a Patent to *Samuel M. Hopkins*, dated July 2d, 1796, granting a certain tract or parcel of land, containing seventy thousand two hundred and two acres, by survey bearing date the 4th of Nov. 1795, and bounded as in the said Patent set forth, which also contained a clause in these words;—"but it is always to be understood, that the survey, upon which this grant is founded, includes 42,000 acres (*exclusive of the above quantity of 70,202 acres,*) all of which having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into Grant &c; and this Grant shall be no bar, in either law or equity, to the confirmation of the title, or titles, to the same as before mentioned."

The plaintiff prayed the Court to instruct the Jury, that all the land included within the lines mentioned in the said patent, passed thereby to *Samuel M. Hopkins*, except such part thereof as might be held by prior claims; and that it was incumbent on the defendants to shew that

2. A Deed of bargain and sale and release of land, from a person not in possession, to another in the same predicament, (the land being, at the time, held by a third person with adverse title,) passes nothing, and therefore does not divest the bargainor of his right to recover in Ejectment.

3. A *cestuy que trust*, after the purposes of the Deed have been satisfied, may maintain Ejectment, upon a demise in his own name, although the legal estate is still in the trustee.

4. A plaintiff in Ejectment may recover under one or the other of two demises, of the same land, from different persons.

the lands claimed by them were held by surveys and entries made prior to the emanation of said Grant, and within the exception therein contained, or by patents issued previous to the said 2d day of July 1796, or other title paramount to that of the plaintiff, or derived from his lessors:—which instructions the Court refused to give, but instructed the Jury, “that the plaintiff was only entitled, under the patent above referred to, to 70,202 acres, provided that quantity was not covered by older titles at the time the patent issued to *Samuel M. Hopkins*; and that, although it should appear to the Jury that there were no claims for the 42,000 acres included by the patent, yet the plaintiff could not recover it, as the Commonwealth had only granted to him 70,202 acres, part of the land within the lines mentioned in the patent; and that, should the whole 42,000 acres not be taken by prior claims to that of the plaintiff, in that case the *residuum* remained to the Commonwealth, but could not be claimed by the plaintiff by virtue of his patent aforesaid.” To which opinion and instructions, the plaintiff by his Counsel excepted.

Decided,
1817.

Hopkins and
Watson.
v.
Ward and others.

In another Bill of Exceptions, it was stated, that the plaintiff offered in evidence the said Patent, and no other evidence of title upon the first Count in the declaration;—that the defendant then produced in evidence, a Deed of bargain and sale and release, signed by *Oliver Wolcott, Mary Watson, Samuel M. Hopkins* and *James T. Watson*, dated June 2d, 1808, duly recorded, (and set forth *in hæc verba*,) shewing that *Hopkins* having, by a previous Deed, conveyed the said 70,202 acres to *Wolcott*, in trust for the benefit of *James Watson*, father of *James T. Watson*, the said *Oliver Wolcott*, with the consent of *Hopkins* and of *Mary Watson* widow of *James Watson*, conveyed and released the same to the said *James T. Watson* in fee simple. This Deed was introduced to prove that *Hopkins* had parted with his title and conveyed the same to *James T. Watson*, and, therefore, that the plaintiff could not recover upon the demise from *Hopkins*. The plaintiff then insisted, that he was entitled to recover upon the second demise in his declaration; from *James T. Watson*; under the deed from *Hopkins* to the said *Watson*. The defendants in-

DECEMBER,
1817.

Hopkins and
Watson
v.
Ward and o-
thers.

roduced proof to shew that they were in possession by adverse titles, of parts of the land in the patent mentioned, at the date of the Deed "from Hopkins to James T. Watson." Whereupon, the plaintiff moved the Court to instruct the Jury, that, even should it appear that Hopkins was out of possession when he made the Deed "to James T. Watson," he was entitled to recover on the first demise, from the said Hopkins; that his said deed was no bar to his recovery, and that he, Hopkins, ought to be considered as a trustee for James T. Watson.

But the Court instructed the Jury, "that, if the Deed from Hopkins conveyed the land to Watson, he had parted with his title, and could not recover upon an Ejectment, though out of possession when he conveyed;—2. that, if the Jury, from the evidence, should be satisfied that Hopkins was out of possession of the lands claimed by the defendants, and that they were in the actual adverse possession thereof, claiming the same, in that case the deed from Hopkins did not convey such a title to Watson, as would enable him to maintain an Ejectment for the lands thus in the adverse possession of the defendants." To these opinions of the Court, the plaintiff excepted.

The Verdict was, "We the Jury find that the plaintiff is entitled to 70,202 acres of land, included in the patent, survey and plat filed in this cause; but whether the claims of the defendants, or either of them, make a part of the plaintiff's claim and are located within its bounds, or fall within the reservation in the patent, we are not satisfied; and therefore we find for the defendants."

Judgment being accordingly entered, the plaintiff appealed.

The cause was argued, December 1st, 1817, by Call for the appellant, no Counsel appearing for the appellees; after which the Court's opinion was delivered by Judge ROANE, as follows:

The Court is of opinion, that, under the terms of the patent exhibited in this case, the grantee was entitled to

all the land contained within the metes and bounds thereof, subject, however, to the reservations in the said patent contained; and that, in the action before us, the appellant was entitled to recover all the said land, except such as the appellees might show themselves entitled to, under the reservations aforesaid.

DECEMBER,
1817.

Hopkins and
Watson
v.
Ward and
others.

The Court is also of opinion, that, if the lessor *Samuel M. Hopkins* was not in possession of the premises at the time he conveyed them to *Oliver Wolcott*, for the benefit of *James Watson*, his conveyance thereof passed nothing, according to the uniform decisions of this Court; and that, in that case, the plaintiff is entitled to recover under his demise from the said *Hopkins*. If, on the other hand, the said *Hopkins* was then in possession, the Court is of opinion, that the Deed was good to pass the land to the said *Oliver Wolcott*, and to enable *James Watson*, the cestuy que trust thereof, to maintain an Ejectment against the appellees, if, and after, the purposes of the said Deed, as to this land, were satisfied; under the authority of the case of *Hart v. Knott*, (*Cowp.* 46;)—and that the lessor of the plaintiff *James T. Watson*, (he being the son and heir of the said *James Watson*, and the Deed given in evidence on the part of the defendants shewing that the purposes thereof were satisfied as to the trustee *Oliver Wolcott*,) was also entitled to recover: so that the plaintiff, as the case now appears, was entitled to recover under one or other of the demises in the declaration. As to the objection founded on the idea, that *Samuel M. Hopkins* was out of possession when the deed shewn by the defendants was executed by him, there is nothing in it. It was not necessary for him to grant this land at that time, if his first deed was good, nor did he mean to grant it thereby, but only to fortify, more clearly, the interest released by the trustee *Oliver Wolcott*.

The Judgment is therefore to be reversed, with costs, the verdict set aside, and a new trial granted, in which, if required, the Court ought to instruct the Jury conformably to the principles now stated.

Decided,
Dec. 12th,
1817.

Curtis against Lunn executor of Jones.

1. A derivative purchaser with notice, is protected by the want of notice in him under whom he claims.—
See *Lacy and others v. Wilson*, 4 *Munf.* 313. S. P.

2. The ground on which an original purchaser with notice, is postponed in equity, is, that the taking the legal estate, after notice of a prior purchase or equity, makes the party a *mala fide* purchaser, and amounts to a fraud.

In order to fix this fraud, however, the proof of notice must be clear.

If it be merely doubtful, a presumption of fraud will not take place.

THIS was a suit brought in March 1809, in the Superior Court of Chancery for the Richmond District, but afterwards (by virtue of the Act of Assembly) transferred to that of Fredericksburg; in which, originally, *Lewis Lunn* executor of *Thomas Jones* deceased was plaintiff, and *Isaac Jones* (a son of the decedent) was alone defendant. It's object was, to recover possession of a bond executed by the defendant to the decedent in his life-time, for the purchase money of a tract of land, sold and conveyed by the said decedent, of which bond (it was alledged in the Bill) the defendant had improperly obtained possession; and to subject the land to be sold for payment thereof, upon the ground that, at the time of the bargain, it was agreed between the parties, that *Issac Jones* the purchaser should execute to *Thomas Jones* the Vendor a mortgage of the land to secure the purchase money.

In June 1811, the plaintiff filed an amended Bill, stating that, after the conveyance from *Thomas Jones* to *Isaac* the said *Isaac* conveyed the same land in trust to *Charles Julian* and *Joel Mason*; and, after the institution of this suit, the said trustees sold and conveyed the same to *George Curtis*, who had full notice of the pendency of the suit; that the said deed of trust was made to indemnify *Enoch Mason* against certain debts mentioned therein, for which he was *Isaac Jones's* surety; that *Enoch Mason*, when he procured the said Deed, had full notice of the equitable lien in favour of the plaintiff's testator on the said land; and the trustees, also, had a like notice; and that the said Deed was executed without the privity or consent of the creditors mentioned therein, who received their debts from the said *Enoch*, and not from the proceeds of the sale of said land. *Enoch Mason*, together with the Creditors and trustees, and *Curtis* the purchaser of the land, were therefore made defendants to the amended Bill.

Upon the Answers, Exhibits and Depositions, the substance of the case appeared to be, that, on the same evening in which the conveyance from *Thomas Jones*, and

bond from Isaac Jones, were executed, Thomas Jones (after the business had been concluded,) observed to Isaac that he ought to give him a mortgage to secure the payment of the money; to which Isaac assented; that Thomas then applied to Enoch Mason to draw said Mortgage; but it being then night, and he having to ride fourteen miles to his home, he declined writing it at that time, but promised to do so at a future day; that, some time afterwards, Enoch Mason, recollecting his promise, requested Thomas Jones the younger (another son of the said Thomas the elder) to obtain from his father a transcript of the bond, to enable him the said Enoch to draw the said Mortgage with accuracy; but upon Thomas Jones the younger's applying for that purpose, the old man seemed offended, and did not furnish the transcript. The Deed of Trust to indemnify Enoch Mason was afterwards executed, on the 6th of March 1807, without the privity of the creditors whose names were mentioned therein; and it did not appear that the trustees had any knowledge of the agreement concerning the proposed mortgage.

Decree, 1817.

Curtis

v.

Enoch Mason executor of Jones.

At the sale of the land, under the deed of trust, Curtis the purchaser was informed by the plaintiff, that a suit was pending in the Richmand Chancery Court respecting the land; the particular object of which suit was not explained; but, being repeatedly assured by Enoch Mason that the title of Isaac Jones to the land was unquestionably good, he became the highest bidder, and paid his money according to the terms of the sale; but at what time, (whether before or after the filing of the amended Bill,) did not appear.

By a written agreement, dated January 3d, 1814, Isaac Jones consented that a decree should be entered in the plaintiff's favour for the debt, and that the land (so far as he was interested in it,) should be subjected to the payment of the same.

Chancellor NELSON made a decree, that, unless the defendant Isaac Jones, or some one of the defendants claiming under him, should pay the debt with interest and costs, within a given time, the land, (after being duly advertised,) should be sold to the highest bidder, for

December,
1817.
Curtis
v.
Lynn execu-
tor of Jones.

cash, by Commissioners, who, after defraying the expenses attending the execution of the Decree, were to pay to the plaintiff the debt with interest, and to the defendant *Curtis*, the surplus, if any.

From this decree, *Curtis* appealed.

Briggs and Wickham for the appellant.

Green for the appellee.

December 18th, 1817, Judge **Roane** pronounced the Court's opinion.

The Court (not deciding whether the appellant, at the time he purchased the land in Controversy, had such notice of the equity now set up against it, as would have postponed him had he been the first or original purchaser) is of opinion that he is protected in his said purchase, if those from whom he claims had no such notice. While a derivative purchaser, with notice, is protected by the want of notice in him from whom he claims; it is important to ascertain the ground on which the original purchaser is himself postponed in Equity. That ground is, that the taking the legal estate, after notice of a prior purchase, or Equity, makes the party a *mala fide* purchaser, and amounts to a fraud. In order to fix this fraud, however, the proof of notice must be clear. If it be merely doubtful, a presumption of fraud will not be made. In the case before us, there is no pretence that any of the purchasers in the trust deed, except *Enoch Mason*, had any notice of the Equity now in question.— He, it is true, was privy to the agreement to give a mortgage upon the land to *Thomas Jones* the testator; and, if the case had rested there, that was such a circumstance as ought to have prevented his making the purchase; and, as he was probably the agent of the other purchasers, might also have affected them: but it is stated in *Mason's* answer, and proved by *Thomas Jones* the younger, that upon his applying to his father, on behalf of *Mason*, for the necessary extracts to enable him to write the mortgage, they were not only refused, but his father was also irritated at the request; and that these circumstances were communicated by him to *Mason*.— This information was well calculated, added to other

circumstances appearing in the cause, to shew a waiver by *Thomas Jones*, of his claim to a mortgage: and, thereafter; it was not fraudulent, or improper in the said *Isaac* to make the purchase.

Decided,
1817.

Curtis

Lum execut-
or of Jones.

The opinion of the Court is, therefore, that so much of the decree, as sets aside the appellant's purchase and decrees the land to be sold, is erroneous and ought to be reversed. And, in as much as the appellee *Isaac Jones* has admitted the whole debt, and has agreed, by an exhibit among the proceedings, that the said land, so far as he is interested in it, might be subjected to the payment of the present debt, the decree ought to be extended to the said *Isaac Jones*, and be so modelled as to give the appellee the benefit of such part of the purchase money as was in the hands of the appellant at the time of exhibiting the amended bill.

The decree is therefore reversed with costs, so far as it conflicts with this opinion, and affirmed for the residue, and the cause is remanded to be further proceeded in, and reformed, pursuant to the principles now stated.

Boyd executor of Hoskins against Kaufmans.

Decided,
Dec. 18th,
1817.

RICHARD KAUFMAN and *John Gresham* and *Jane* his wife, children of *John Kaufman* deceased, filed a Bill in the Superior Court of Chancery for the Williamsburg District, against *Robert Boyd*, Executor of *William Hoskins*, who was executor of the said *John Kaufman*, for an account of assets, and recovery of whatever balance might be due to them as residuary legatees. With the bill, was exhibited an *ex parte* settlement of the administration account of *William Hoskins* executor of *John Kaufman*, said to be "in pursuance of an order of the County Court of King and Queen," and certified by the

1. A settlement of an Executor's administration account, certified by Commissioners on a day subsequent to his death, and not appearing to have been made in his life time with notice to

himself, nor, after his death, with notice to his executor, is erroneous, and ought not to be received as the ground of a decree against his estate.

2. *Quere*,—if an Executor die indebted to the estate of his testator, without any judgment or decree against him for the balance due; and his executor, without notice of such debt, apply the assets of his estate to the payment of debts of inferior dignity,—is he guilty of a *devastavit*? See R. Code of 1819, c. 104, § 60.

Docketed, Commissioners July 14, 1800, showing a balance due from him to the estate of his testator, of 112*l.* 4*s.* 1*d.*

Boyd execu-
tor of Hos-
kings
v.
Kaufmans.

The defendant in his answer alleged, that he had never received any assets of *Kaufman's* estate; that he had paid away to creditors the assets of the estate of *Hoskins*, without notice of the claim of the plaintiffs; and did not admit that any thing was due to them. To the Answer was annexed an *ex parte* settlement of the defendant's account as Executor of *Hoskins*, shewing a balance due to him of 6*l.* 0*s.* 10*d.* By a Copy of the Will of *Hoskins*, it appeared that he was dead when the statement of his administration account was made; his Will being dated December 8*th*, 1799, and admitted to probate, February 10*th*, 1800.

The cause was heard on Bill, Answer and Exhibits only; whereupon Chancellor NELSON decreed, that the defendant, out of his own estate, pay, to each of the plaintiffs, 56*l.* 2*s.* 0*d.*, with Interest from the 14*th* of July 1800, and Costs.

In a Petition of Appeal, this decree was said to be erroneous, 1. because the report of Commissioners, of July 14*th* 1800, was made *ex parte*, and without notice, and did not appear to be warranted by any order of Court appointing Commissioners; 2. because the Decree was founded on the erroneous opinion, that an Executor is liable for debts due from his testator as Executor, without notice of such debts, and that, without such notice, the payment of debts of inferior dignity is a *devastavit*;—and 3. because the Chancellor should have directed an account to be taken, and should not have decreed against the defendant personally.

Wickham for the appellant.

Green for the appellee.

December 18*th*, 1817, Judge ROANE delivered the Court's opinion.

The Court is of opinion, that the decree is erroneous in this; that the settlement, on which the said decree was founded, was made after the death of *W. Hoskins* the executor of *John Kaufman*, and without notice thereof to the appellant his executor. As the case now appears, therefore, the estate of the said *Hoskins* may owe nothing

to the appellees; nor can we say from the case, as it now appears, that the appellant was not justified in administering the estate of his testator, as, from his account, it appears he has done. But, as the appellees may have been diverted from establishing their claim by other testimony, by the erroneous opinion of the Court of Chancery in relation to the settlement aforesaid, they ought now to be permitted to establish the same by such other evidence as may be in their power, and also to falsify the executorial account of the appellant, among the proceedings, if they shall be able to do so.

Duckman,
1817.

Boyd executor
of Hos-
kins
v.
Kaufmans.

The decree is therefore reversed with costs, and remanded, to be proceeded in pursuant to the principles of this decree.

Colemans against Holladay and others.

Decided Dec.
20th, 1817.

The controversy in this case turned on the construction of certain clauses in the Will of *Zachariah Lewis* deceased, which, together with the other circumstances, and the points made by Counsel, are sufficiently stated in the following opinions of the Judges of this Court, delivered Dec. 20, 1817. The case was twice argued, by *Stanard* and *Wirt* for the appellants, and *Call* and *Wickham* for the appellees.

1. A testator, by his Will, lent certain slaves to his daughter *Betty L.* during her natural life; and, "immediately after her death," he gave the said slaves and their increase, to her children then living, and to the legal representatives of such of them as should be dead: "but, in case all her children should die

Judge COALTER. *Zachariah Lewis* made his Will, in which, among others, are the following bequests:

"I lend unto my daughter, *Betty Littlepage*, one negro girl, out of those I last bought, during her natural life; and immediately after her death, the said negro and her issue, if any, I give to be equally divided among my said daughter's children then living, and their legal representatives; but, in case they should all die, without issue living, in the life time of my son-in-law *James Lit-*

on the life time of her husband *James L.*, then the said slaves to go to him." *James L.* died after the testator, in the life time of *Betty L.*, and bequeathed all his slaves to his son by a former wife. *Betty L.* married again, and had other children, and, together with a child of her's by *James L.* were living at the time of her death. It was determined that her children by the second husband were, equally with that child, entitled to the slaves bequeathed to her as aforesaid.

December
1817.

Coleman
v.
Holladay and
others.

"*Littlepage*, then the said slave and her issue to go to the said *James Littlepage*. All the rest of my slaves and personal estate, not herein before disposed of, to be divided into eight equal parts, one part whereof I give to each of my children, to wit, *John*, &c. (naming seven of them,) and their heirs forever: the other eighth part I lend unto my daughter *Betty Littlepage* during her natural life; and, immediately after her death, I give the said slaves and their increase, and the said personal estate, unto her children, then living, and, in case any of them are dead, to their legal representatives; but, in case all her children should die in the life time of my son-in-law *James Littlepage*, then the said slaves and personal estate to go to him."

Betty Littlepage had two children by *James*; to wit, *Lewis* who died in 1802, without issue, and *Mary* who intermarried with *R. S. Coleman*, and is yet alive.

Zachariah Lewis, the testator, died about the year 1765; and *James Littlepage* shortly after.

Betty Littlepage, his widow, intermarried with *Lewis Holladay*, by whom she had several children, who are the appellees. She survived her son *Lewis*, and died in the year 1809. After her death, her husband delivered over the slaves (33 in number,) to the Executor of *Zachariah Lewis*.

The children of *Coleman*, to whom he has transferred his interest, are appellants, and alledge that the children of *Betty* by the second marriage, are not entitled under the Will: (1.) they also alledge that *Lewis Littlepage* has bequeathed his interest, they don't say to whom, or in what manner, but that it may become a question whether he could dispose of any right under the Will. The Will of *Lewis Littlepage* is not in the record.

James Littlepage, by his Will, left all his slaves, not already given by Deed, and a tract of land, to his children by his first marriage.

(1.) Note. Chancellor *TAYLOR* decreed a third part of the slaves in question, and of their profits, to each of the two children of *Betty* by the second marriage, (who were the plaintiffs,) and the remaining third to the children of *Mary Coleman*, who thereupon appealed.

We thus learn that he had been married, and had children, before his intermarriage with *Betty Lewis*; and this circumstance tends to shew why the testator *Zachariah Lewis* did not bequeath to his daughter *Betty* in fee, as he did to his other married daughters:—he wished her children to take in exclusion of those of *James Littlepage* by his first marriage.

It will be conceded that the general words of this Will, if the clauses in favour of *James Littlepage* had not been in it, would have extended to all the children of *Betty* by any marriage; but it is said those clauses shew the testator had not a second marriage in view; that they limit the general words; and therefore the children, by that marriage, are not persons described, and consequently can not take: that, by the wording of those clauses, it appears he intended that all the children who were to take, might, by possibility, die in the life time of *James Littlepage*.

DICKMAN,
1817.

Colemans

V.
Holladay
and others:

To this I answer, that all the children of *Betty*, by whatever husband, are equally near the testator, and may reasonably be presumed to be within the *general intent*, as they certainly are within the *general words* of the Will; and if those words are not necessarily restrained by other bequests or expressions in the Will, they must have their full operation. As for instance, if the bequest to *James Littlepage* would fail, or be obstructed, by permitting those words to retain their common meaning and import, then that bequest would narrow them; but, if the general words extend to all the children, and such bequest is most reasonable, and can well stand with his intentions towards *James Littlepage*, for what purpose shall we suppose that he did not intend what he expressed? These clauses in favour of *James Littlepage* do not appear to have been introduced for the purpose of explaining or narrowing the preceding bequests, but were intended, in certain events, to create an estate in him; and therefore I am not satisfied with the propriety of resorting to the phraseology there used in order to impose restrictions on preceding general words, when the interest of the legatee *James Littlepage* will not be changed

DECEMBER,
1817.

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Colemans

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Holladay
and others.

thereby, and when no reason for such restriction can be assigned.

It is said that, by these latter words, he evidently intended that none should take except such as might, by possibility, die in the life time of *James Littlepage*. But this I think will lead us too far: for, let us suppose there had been no child born at the death of *James Littlepage*, but that a posthumous child of his had afterwards been born; would such a child have been excluded on the ground that, not being alive at the death of *James*, he could not by possibility die in his life time?—and what would have become of the estate on the death of *Betty*, leaving such child, and also children by a second marriage? Would it have gone to the executor of *James Littlepage*, as a vested interest in him, transmissible, and passed under his Will to his children by a former marriage? or would it have resulted back to the estate of *Z. Lewis* the testator? and all this notwithstanding she left not only a child by *James Littlepage*, but other children, at her death? Or would it have gone to this posthumous child, in exclusion of those by the second marriage, altho' that child was no nearer to *Betty*, nor to the testator, than the others, and could not, any more than the others, have died in the life time of *James*? Or, let us suppose that all the children by *James Littlepage* had died before their mother, without issue living, and that she had then died leaving the appellees her children; could either the Executor of *James Littlepage*, or of *Z. Lewis*, have recovered these slaves from them, as not being persons described, altho' they were her children, alive at her death?

The testator looked, in the first place, to the death of his daughter *Betty*, who had the life estate, and to the situation of her family at that time. Her children then alive &c. were to take in that event. But there was another event to which he also looked:—these children might all die, without leaving children alive, before *James*, and then he is to take. But he was not intended to take, except in this double event; that is, he must survive the tenant for life, and also her children; for, on his death before her, and them, the legacy as to him must lapse; so that the construction given to the Will, as between the two classes

of children, can have no effect on his interest; and, consequently, these clauses can not, in that respect, affect the construction of the preceding general clause.

DECEMBER,
1817.

Coleman
v.
Holladay
and others.

The case of *Jones v. Morgan* (*Fearne* 330,) so much relied on, was the case of a devise limiting over a reversion expectant on a settlement, in tail male, on the issue male of the testator by his then wife. She was alive, and contemplated as surviving the testator, since she was made a Guardian of his children and an Executor of his Will. The question arose on these words in the Will;—“and forasmuch as it is my Will, intent and meaning that, in case my said two sons now living, or any other son or sons of mine lawfully begotten, hereafter to be born, should die without issue male of their bodies, &c. that then all and singular my messuages, lands, &c. in &c.” (being the same lands settled,) “shall be devised, settled, &c.,” going on to make the limitation over; and the question was, whether the testator meant sons by any future wife; which intention, unless an estate tail could be raised to them by implication, would defeat the limitation over, there being no particular estate to support such future devise. It was determined that sons by a future marriage were not intended; and, if they had been intended, no estate tail could be raised to them, and so the limitation would have been defeated. This was well determined; first, because such construction of a Will ought to be made, if possible, that every clause and limitation shall have effect; and hence it becomes necessary that general words, which otherwise would defeat the whole intention of the Will, must have bounds put to them: secondly, it was not the object of the testator to devise to his sons, and that by implication, an estate in the lands in tail male, which they already had by the settlement; but the object was merely to limit over the reversion expectant in the testator, if the sons by that marriage should die without issue male; the idea therefore of an implied devise to the sons either of that or any other marriage; was very properly rejected, from the manifest object of the Will itself, and for this farther reason, that the testator clearly appeared not to contemplate a

DECEMBER,
1817.

Colemans
v.
Holladay
and others.

future marriage, but the event of his then wife surviving him.

I do not see how the testator, in the case before us, if he had foreseen the precise events that have taken place, and had intended all the children to take, could well have provided therefor by more apt words than he has used; and, when the justice and reasonableness of the case is with this exposition, I must be excused for not losing sight of those beacons, when, in my judgment, no rule of law or of sound interpretation interposes.

As to the rights of *Lewis Littlepage*, I understand the parties on both sides to admit that, according to his Will, there will be little difference between them, be the decision either way. As, however, that Will is not before us, nor do I know who the parties claiming under it are, I will merely state my present impressions, which are that, (as I understand he died before his mother without issue,) the legacy never vested in him, and that he had nothing to bequeath. I am therefore for affirming the decree, but without prejudice to any claim, which may hereafter be asserted, by parties not now before the Court, under the Will of *Lewis Littlepage*.

Judge CABELL was of the same opinion.

Judge BROOKE.—Whether the Will in this case is susceptible of the meaning attributed to it by the Chancellor will depend on a correct construction of the two clauses set out in the Bill, in connection with the first clause, in which the testator declares his intention to dispose of his whole estate. It would not be contended, I presume, that, by the devises to his daughter *Betty* and her children, considered exclusively of any other part of the Will, the testator intended to exclude any of her children living at her death. The words are, “I lend
“to my daughter *Betty Littlepage* one negro girl, out of
“those I last bought, during her natural life; and, immediately after her death, the said negro and her issue,
“if any, I give to be equally divided among my said
“daughter’s children then living, and their legal representatives.” This last expression certainly comprehends all the children of *Betty*, in exclusion of none

living at the time of her death. The words import, as strongly as possible, the intention of the testator to provide for his daughter *Betty* and all her children living at her death. Nor are they to be affected by any criticism on the expression, "my daughter *Betty* LITTLEPAGE." It was the name she then bore. Names are only the *indicia* of persons; and the inference attempted to be drawn from the grammatical relation of the words, "immediately after her death," to the words, "my daughter *Betty* Littlepage," whereby to restrict the devise to the children of *Betty* Littlepage, *eo nomine*, would be too nice to be permitted to control the general meaning of the sentence. Nor would it be strictly grammatical. The relative "*her*" is a personal pronoun:—it is identical, and not nominal in its meaning, and refers to the person *Betty* Littlepage, by whatever name she might afterwards be called. It was his daughter *Betty* and her children, and their issue, then, that the testator meant to provide for.

DECEMBER,
1817.

Coleman
v.
Holladay
and others

This construction, however, is supposed to be overthrown by the devise over, to *James* Littlepage the husband, in the following words;—"but, in case they" (meaning the before named devisees,) "should all die without issue, living in the life time of my son-in-law *James* Littlepage, then the said slave and her increase to go to the said *James* Littlepage. The argument is, that the testator certainly intended to include the children of *James* Littlepage only, in the previous member of the clause, because it would be absurd to suppose that he meant to postpone the devise to him, until the death of *Betty* his wife, and of her children by a second marriage. The answer I think is, that no such intention is insisted on. The event on which *James* Littlepage was to take, is plainly declared in the clause to be on the death of *Betty*, and all her children, and their issue, in his life time; an event very possible, and not altogether improbable. If his wife *Betty* had died in his life time, without children, or their issue, living, his contingent interest would immediately have vested. But the event,

DECEMBER,
1817.

Colemans

v.

Holladay
and others.

on which the property was to pass to the children and their issue, was a very distinct one:—it was on the death of their mother *Betty*. Nor is there any conflict between their interest, under this exposition of the Will, and the interest of *James Littlepage* the husband. On the contrary, if the construction contended for is adopted, some of the children of *Betty* living at her death must be excluded. This would violate the obvious meaning of the general words in the first member of the clause, without affording the slightest aid to effectuate the intention of the testator declared in the devise over to *James Littlepage*, and impair the general rule, that none of the words in the Will shall be rejected, unless to effectuate the obvious intention of the testator declared in some other part of the Will. This exposition I think equally applies to the other clause, in which one eighth part of the property previously purchased is devised to *Betty* and her children. Though the expression, “but, in case they shall all die without issue,” in the clause before referred to, is omitted, and the expression, “and, in case any of them are dead, to their legal representatives,” substituted; it is not believed the testator intended a different disposition of the property. He intended, in both cases, to provide for the children of *Betty*, and their issue, living at her death:—he could not therefore intend to provide for those who might claim in the character of legal representative of any of the children who may have died without issue in her lifetime. There is nothing in the Will from which to infer, that the testator intended to provide for the children of the marriage, of *James Littlepage* with his daughter *Betty*; or that he was under any obligation so to provide. If there was, a different construction perhaps ought to prevail. On the contrary, it appears by the Will, that he had made a similar provision for all his daughters; with the exception that there is no limitation over to the husband of any of them, (except to the husband of *Betty*,) either of the property previously given to them, or of that bequeathed to them by the Will: and, the more forcibly to evince his intention

to make their parts of his estate equal, he gives to his daughters *Betty* and *Dorothea* forty pounds more, in the division of the personal estate, than to the others;—"in order (as he says,) to make each of my daughters' parts of my estate equal:"—by which provision, he certainly intended that the portion of his daughter *Betty* and her children, in exclusion of none of them living at her death, should be as ample, both in interest and amount, as that of his other daughters and their children. The circumstance, that the parts of the other daughters would belong to their husbands by virtue of their marital rights, does not affect this view of the Will. It only serves to place it in a stronger light; because it shews that the testator, though willing to confide the provision for his other daughters and their offspring, to their husbands, was determined to take care of his daughter *Betty* and her offspring himself; from which it is not possible to infer a preference of the children of *James Littlepage* to those of any other marriage. A different exposition would also be in hostility to the first clause in the Will, in which the testator declares his intention to dispose of his *whole* estate; which intention he carries into effect by apportioning his property among his wife and all his children:—because, if the children of the second marriage of his daughter *Betty* are to be excluded, (as is contended,) the portion devised to her, in the event that all the children by the first marriage had died in her life time, would have returned to the Executor, as undisposed of by the testator; a result in manifest opposition to the intention of the testator to make the portions of all his daughters, equal in interest and amount; and, also, to his intention, declared in the first clause, to dispose of his whole estate; and in direct violation of his intention to provide for his daughter *Betty* and her children, and their issue, living at her death.

The case of *Coleman v. Seymore*, 1 *Vezey sen'r.* 209, relied on by the Counsel for the appellants, has no direct application to the case now before the Court. The question in the case cited was, whether money legacies vested in the younger children then born, were subject to variation,

Decided,
1817.

Coleman
v.
Holladay
and others.

DICKINSON,
1817.

~~~~~  
Colemans  
v.  
Holladay  
and others.

as to amount, at the pleasure of the mother, in exclusion of those by a second marriage:—the Lord Chancellor considered the intention to be to vest a *present* legacy in the children then born, in exclusion of those by the second marriage; but said, it might be different if the testator had given it to the mother for *life*, (as in the present case,) and afterwards to her younger children; because, then, it would have been a *contingent interest*, and a devise over. He said also that no general rule, in such cases, had been laid down; but that they had turned upon the particular words, the circumstances and views of the testators.

The case of *Jones v. Morgan*, in 2 *Fearne*, has as little application. The devise over to *T.*, in that case, would have been *defeated*, if the Court had not restricted the words, “any other son or sons of mine, thereafter to be born, as aforesaid,” to the sons of the first marriage. The rule has always been to restrict general words in a Will, if such restriction be necessary to effectuate the intention of the testator plainly deducible from some other part of it. In the case now before the Court, the estate is given to the mother for life, with a contingent interest to her children; as seems to have been deemed necessary, by the Lord Chancellor, if the children by the second marriage were to take, in the first case cited. Nor is it necessary, in the present case, to restrict the general words, in the devise to Betty and her children, to effectuate the intention as to *James Littlepage* her husband; because his interest was contingent, upon the death of his wife, and her children, and their issue, in his lifetime; upon which event, he would have taken the estate devised to him, as before remarked.

Judge ROANE. I regret that I have to differ in this case from all my colleagues. That regret is increased by a firm belief on my part, that my construction of the Will before us entirely accords with the intention of the testator. It accords, as I humbly conceive, with that intention, both as it is inferrable from general principles of construction, and from other parts of the Will; and as it depends on the particular clauses of the Will more immediately in question.

in ascertaining what is the intention of the testator, upon the first ground above mentioned, I shall keep out of view, for the present, a critical examination of the clauses just alluded to. That belongs, more particularly, to the next head of enquiry. I shall only attempt to come at the testator's meaning, by referring to other parts of his Will, and to general principles of construction, relating to the subject.

DECEMBER,  
1817.

Colemans  
v.  
Holladay  
and others.

I take it to be one of those principles, that, altho' a general presumption is sometimes made against a Will disinheriting the whole of a man's progeny, no such presumption exists where a part of them, only, are excluded, in favour of others. In such cases, admitting the testator's power of disposition, we are to enquire what the bequest really is. His Will stands for a reason. We are then, in such cases, to array one part of his family against another, and to decide between them, as if they were different persons, to what part of them the bequest really extends. If this be true in relation to a testator's children, it will hold *a fortiori*, as to their children or remote descendants.

While we bear this principle in mind, we find that our testator has not provided for any of the children of his other daughters, whether of their then or future marriages. He has sacrificed the interests of those daughters' children, by giving the property absolutely to their mothers, which, of course, immediately vested in their husbands. The Will, therefore, shews no general intention in favour of the progeny of his daughters, in derogation of the rights of their husbands, which might extend its influence, also, into this case. Are there any particular circumstances applying to this daughter, (*Mrs. Littlepage*), which would give a preference to her unborn issue of a future marriage, in this particular, and place them on a higher ground than any of the issue of any of her sisters? There are none. She is not shewn to have been a particular favourite of the testator. There is, therefore, no greater hardship in his omitting to provide for the children of her future marriages, than in his failing to provide for all the issue of his other daughters. You can

DECEMBER,  
1817.

Colemans

v.

Holladay  
and others.

not infer *that* to be the *general* intention of the testator, which, if it exists at all, exists only in one particular case.

What then was the object of the testator in the case before us? It was to abridge the marital rights of this husband (*Mr. Littlepage*;) and, as far as they are abridged, on a fair construction of the Will, he must submit to it. They are abridged in favour of his own children by his wife; but, subject to their contingent claim, his was a vested and transmissible interest. They are not abridged in favour of the children of *Mrs. Littlepage's* future marriages, as I shall now attempt to shew. It never entered into the testator's mind to provide for the children of such future marriages: they stand, in this particular, upon a common ground with the children of all his other daughters.

In considering this case, more particularly, under the two clauses of the Will now in question, it is to be remarked, that the construction is to be made upon the whole Will taken together. Every word is to have it's effect: every string is to give it's proper sound. If a testator has used words, in even a former part of his Will, in too large a sense, he may restrain and qualify them in a latter: and if this be true in relation to distinct and finished clauses, it is much more true as to words comprehended in the *same* sentence. The testator ought, especially, to be permitted to explain such words as have scarcely escaped from his lips. In the case before us there is no contradiction to be reconciled, nor abridgment to be made, in relation to words found in different and distinct parts and clauses of the Will. We claim the clearer privilege of performing this office, as to words contained in the *same* sentence. We only ask that the testator may, himself, explain ambiguous words in the first part of a given sentence in his Will, by clearer words found in the last: that he may correct and abridge words, used in too large a sense in the first part of a given sentence, by more limited expressions contained in the last. We ask, in short, that, when the *whole* Will is to be looked into in forming a construction, such words, as are essentially explanatory and restrictive, may not be rejected.

DECEMBER,  
1817.

Colemans

v.  
Holladay  
and others.

In the second clause of the Will before us, after giving the eighth part of his slaves to his daughter *Mrs. Littlepage*, during her life, the testator gives it, immediately after her death, to "her children then living, and their legal representatives." I do not say that these words, standing alone, would not extend to all the children of every marriage. On the other hand, I may affirm, that these words "her children," may more naturally be restricted to the children of the then marriage, than if the words "all her children" had been there used: but, even in this last, and stronger case, the words would readily have yielded to the restriction. These words, however, do not stand single. The testator goes on to say, "but in case all her children should die in the life time of my son-in-law *James Littlepage*, then the said slaves and personal estate are to go to him." Here the testator, after using the more comprehensive terms "all her children," goes on to shew that he, nevertheless, does not mean any children but those of the then marriage; for such only could, by possibility die in *Mr. Littlepage's* life time. They could not die before they could come into existence. Altho', therefore, the testator said "all her children" in this place, he did not mean them all, but only those of that particular marriage: and I presume it to be the clear meaning of a testator we are to regard, and not his inaccurate expressions. If, too, the testator evidently meant the children of the then marriage, when, in the last part of the sentence in question, he used the more comprehensive phrase "all her children," much more did he mean it in the first, where the word "children" only is used; and that is the part which more immediately contains the limitation under which the appellees claim.

The first clause of the Will, in relation to a negro girl, is substantially similar to the second, and must receive the same interpretation. In relation to both, my construction is supposed to be clear. It will be admitted on all hands, that if, after using the words "her children," or even "all her children", the testator had expunged them with his pen, and substituted the words "all her children by *Mr. Littlepage*; or if, without ex-

Duchess,  
1817.

Coleman  
v.  
Holladay  
and others.

punging them, he had gone on to say, *totidem verbis*, that by those words he meant the last mentioned children only, the former words would have been restricted and explained to mean those children only. The case cannot be different when, instead of expressing his meaning by one or other of the above modes, the testator has so expressed it, by using a description which can not be otherwise satisfied. He could not have meant children born after the death of Mr. *Littlepage*, and by another marriage, when, in the same breath, he considers them such as might die in his lifetime.

This construction, called for by the necessity of giving effect to all the testator's expressions, is entirely analogous to one of the most common occurrence in the law.— In the case of *Hill v. Barrow*, for example, (2 Call 342,) the devise was to T. H. and *his heirs*, but, in case he should die without a *lawful heir*, then the land was to go over to R. H. the brother of the devisee. These words "*his heirs*" were narrowed and pared down to mean heirs of the body only, by the last words used in the sentence, because the testator could not have meant heirs general, although he said so, for the devisee could not die without an heir whilst his brother was living. So, in the case of *Sydnor v. Sydnor*, 2 Munf. 263, the general words, to "A. and *his heirs forever*," were narrowed to carry an estate tail only, from a subsequent provision in the Will, that, if he should die without *heirs of his body*, then the estate should go over. In both these cases, the general words in the first part of the Will were restrained and narrowed, so as to conform to the undoubted meaning of the testator, as expressed in the last.

I do not deny that a testator may frame his Will upon a double aspect: as, in this case, he might have adapted it, 1st, to the event of his wife's dying in Mr. *Littlepage's* life time; and 2dly, to that of her surviving him and having issue by future marriages. But then this intention ought clearly to appear. We ought not to infer this second aspect, by garbling and suppressing a part of the testator's expressions, and going upon a supposition, neither warranted by general principles, nor by any other provisions of this Will, that the testator could not have

intended to benefit any of his daughter's children. We ought not to adopt this construction by denying to the testator the common privilege of explaining or narrowing the meaning of an expression he had previously used. If we allow him that privilege, in the present case, there is no ground to say that the testator, in the clauses before us, contemplated the future children of Mrs. Littlepage, more than those of his other daughters.

Decided, 1817.

Coleraine, V. Holladay and others.

My opinion, therefore, is, that the Decree should be reversed, and bill dismissed. That, however, is not the opinion of the Court. Their opinion is, that the decree should be affirmed; and it is to be affirmed accordingly.

I understand it to be the opinion of the other judges, that, *Lewis Littlepage* having died without issue in the life time of his mother, those who claim under his Will are entitled to no part of this interest; and in that opinion I concur.

### Daniel and Wife against Macclins.

Decided Jan. 7th 1818.

IN assumpsit, by *James Daniel*, and *Anne* his wife, against *John B. Macclin*, and *William W. Macclin*, the declaration charged, that the defendants were indebted to the plaintiff *Anne* while sole, in the sum of \$336 50 cents, for 49½ barrels of corn, (being the proportion of corn, belonging to the said *Anne* while sole, of a certain crop made, in pursuance of the last Will of her first husband *William Macclin*, upon the plantation whereon he resided at the time of his death,) which corn was by the defendants applied to their own use; and, being so indebted, they assumed, &c., in the usual form. Plea non assumpsit.

1. A Widow, (being entitled, under the Will of her husband, to make a crop on his home plantation, in conjunction with one of his sons, and to a sufficiency of corn and pork, with necessary working utensils, for her support and that of her family, the

first year, on a plantation directed to be purchased for her,) agreed to give up, to two of the said defendants her executors, (one of whom only, with a third person, administered for her part, of the crop, then growing, upon condition that they should purchase as much corn and provisions, the ensuing winter, as herself and a friend of hers should judge sufficient to settle her on the said plantation, which was accordingly done. This was held a binding compromise of her right to the share of the crop.



JANUARY,  
1818.

Daniel and  
Wife  
v.  
MacLins.

At the trial, the plaintiffs introduced testimony in support of their claim, and, among other things, the Will of *William MacLin*, whereby the testator directed that his executors should purchase a plantation for his widow, and furnish the same with a sufficient quantity of *corn* and *pork*, and *necessary working utensils*, for her support and that of her family the first year; and, also, that, until the said land should be purchased, she should continue to reside on the home plantation, and work her hands with those of his son *William W. MacLin*. It was admitted that, during the said year, when the said *Anne* and *William W. MacLin* worked their hands together on the said plantation, the said 49½ barrels of corn were made. It appeared that both the defendants, together with *Joseph Wilkins* and the said *Anne*, were named executors in the said Will; but one of them only, with the said *Wilkins*, administered. The defendants proved, by a witness, that the plaintiff *Anne*, in the fall of the year 1806, agreed with the defendants, to give up her proportion of the corn, then growing and making by her hands and those of *William W. MacLin*, if they would purchase as much *corn* and *provisions*, in the ensuing winter as herself and a *Mr. James Lewis* should judge sufficient, to settle her on the plantation which had been purchased agreeably to the said Will. They also proved that the corn last mentioned, *was purchased for her by the defendants*. It was admitted, that the said *provisions* were furnished agreeably to the contract stated by the witness; and that the defendants divided between them, and applied to their own use, the said 49½ barrels of corn.

The plaintiffs demurred to the Evidence, and the Superior Court gave judgment for the defendants.

*Bouldin* for the appellants. Under the circumstances of this case, the law raised an *assumpsit*, without proof of an express promise. The slightest appearance of contract will change the action of trover or trespass for taking goods, into *assumpsit* for their value, at the election of the plaintiff. (a) The declaration charges a promise to pay for the corn of the plaintiff used by the defendants; and the question is, whether by law such contract

(a) *Bennett v. Francis*, 2 *Dec. and Pal.* 553.

JANUARY,  
1818.Daniel and  
Wife  
v  
Maclin.

results from the evidence. The proof is, that the plaintiff promised to give the defendants the corn, if they would give her *what was already her own*: they used her corn, and paid her only what they before were bound by the Will to pay. Does not the law imply a promise to pay the value of the property thus improperly received by them?

*Mrs. Maclin* was not by law compelled, nor in conscience any way bound by her consent, to relinquish the 49½ barrels of corn, in consideration of the executors' giving her the provisions, to which by the Will she was entitled. It was a mere naked agreement, which gave no right to the party claiming under it, and ought not to defeat the claims of the plaintiffs.

May for the appellees. Wherever the presumption of a contract is *expressly excluded*, *assumpsit* will not lie.— Instead of a promise to pay for the 49½ barrels of corn, there was an express agreement between the parties, that it was not to be paid for. This agreement was binding on *Mrs. Maclin*; for *William W. Maclin* one of the defendants was not executor, and there might not have been assents if he had qualified. This was surely *not nudum pactum*. The contract was with him and the other defendant as individuals. They actually paid and advanced the "corn and provisions," a broader word than "pork." She gained another advantage by it: she was to have as much corn and other provisions, as she and her friend *Lewis* should judge sufficient. Besides, she was named in the Will as one of the Executors, and fully acquainted with all it's provisions. (b)

*Bouldin* in reply. This is a plain attempt on the part of the defendants to cheat the widow out of the corn.— They used it under a contract, and not tortiously. The question is, whether that contract may not, for purposes of justice, be extended a little, to imply a promise to pay in their property, instead of *her own*, which would be ridiculous and absurd.

*William W. Maclin* was named an Executor in the Will. So far as he acted in this case, it was as Executor;—in his own wrong, if you please. His acting with his

(b) *Bills*  
*v. Lumley*  
and others, 2  
East 469.

JANUARY,  
1818.

Daniel and  
wife  
v  
Macline.

brother who had qualified, does not make it the less *nudum pactum*. They did not in the slightest degree ever stop the allowance by the Will, which is evidence in this cause.

Judge ROAST pronounced the Court's opinion.

The Court is of opinion, that, although the appellants may have been entitled to the corn, in the declaration mentioned, and for the value of which this action was brought, under the true construction of the Will of *W. Maclin* deceased, yet the female appellant having compromised her rights accruing under the said Will, by relinquishing this claim, and that with a full knowledge of all the circumstances, it was not competent to the appellants to set up the said claim thereafter; and that the law upon the demurrer to evidence is with the appellees. On this ground, the judgment is affirmed.

Decided,  
Jan 27, 1818.

### Blakey against Newby's administrators.

1. A plaintiff suing for slaves as administrator of his Wife, is not barred by a decision against him, in her life time, in a suit to which she was not a party; the ground of that decision having been that, under the Act of Limitations, the

AFTER the decision of this Court, in the case of *Newby's administrators v. Blakey*, 3 H. & M. 66, a bill in equity was filed, against the said administrators, by *John Chowning*, and *Catharine* his wife, who was formerly *Catharine Chowning*, *Lucy Street* who was *Lucy Chowning*, and *Churchill Blakey* administrator of his deceased wife *Anne*, who was *Anne Chowning*, all daughters and devisees of *William Chowning* the elder, to recover the slaves of which *Oswald Newby* was possessed in right of his wife *Catharine*, legatee of her aunt *Elizabeth Chowning* and heiress of her sister *Anne C. Taylor*, and which the Court of Appeals, in the case aforesaid opposite party had obtained a legal title to the slaves by five years possession commencing during the coverture; during which also the right of the Wife accrued; and the husband having never had possession in his character as husband.

2. If slaves specifically bequeathed, be in the possession of a person who is at the same time executor of the testator and husband of a legatee, such possession will enure to him in the character of executor only, unless there be some election, or some act indicative of an intention to take, in the character of husband; especially, where the bequest is to several legatees jointly, and no division among them has taken place.

and assigned to the said administrators. The Bill stated that the slaves in question were improperly bequeathed by *Elizabeth Chowning*; because, at her death without issue, they belonged to the plaintiffs, by virtue of the Will of *William Chowning*; the plaintiffs *Catharine and Lucy*, and the deceased *Anne*, having survived the said *Elizabeth*, and all being married at the time of her death; but that his executors, being misled by erroneous advice of Counsel, gave them up to her legatees, *Anne C. Taylor*, and *Catharine Taylor*, who afterwards married *Oswald Newby*—that, after the death of the said *Catharine Taylor*, *Churchill Blakey*, one of the complainants, as executor of *William Chowning*, and in right of his wife *Anne* and her sisters, made a demand of the slaves from the said *Newby*, and was about to commence a suit for them, which suit was prevented by a compromise or special agreement, that, if the claimants would not bring suit, but permit him to hold the said slaves during his life, he would, by a last Will, bequeath them to the complainants, to be divided according to the Will of *William Chowning*; that, by virtue of the said compromise the slaves remained with *Oswald Newby* during his life; and the Complainants understood and believed that, in fact, he left a Will made in conformity therewith, which, after his death, was fraudulently concealed or destroyed:—that the case agreed in *Newby's administrators v. Blakey*, was defective in not setting forth all the points involving the merits of the cause; particularly, the important facts, of the agreement or compromise aforesaid, and coverture of some of the Complainants.

JURANT,  
1818.

Blakey

Newby's ad-  
ministrators.

The prayer of the Bill was, for an Injunction restraining the defendants from selling or distributing the slaves, and for general relief.

*Newby's* administrators, filed separate answers, but, in general, to the same effect; denying all knowledge of the compromise alledged, or that he left a Will; and claiming the slaves, which they believed were taken from their possession in an improper and illegal manner. *Pritchard Newby*, one of them, admitted that *William Chowning's* legatees remained in possession of their legacies with the

JANUARY,  
1818.

Blakey

v.  
Newby's ad-  
ministrators.

assent of his executors; but the respondent know not whether they claimed title under the Will, or under the gift which was said to have been previously made by the said *William Chowning*.<sup>(1)</sup>

Sundry depositions were taken, shewing probably, that the compromise stated in the Bill was actually agreed upon, and that *Oswald Newby*, in pursuance thereof made a Will, which was destroyed by his mother; that one of the slaves, a negro boy, was sent to *John Chowning's*, in *Newby's* life time, as a nurse, and stayed there twelve months, and then was carried back to see the said boy's mother at *Newby's* plantation; shortly after which, the said *Newby* died; and then all the said slaves absconded, and went to *Churchill Blakey*.

The proceedings in the suit at common law, of *Newby's administrators v. Blakey*, were an exhibit in the cause.

Chancellor NELSON dismissed the Bill as to the plaintiff *Blakey*, and decreed in favour of the other plaintiffs for their respective proportions; being of opinion, "that the limitation over of the slaves mentioned in the bequest from *William Chowning* deceased to his daughter to *Elizabeth*, was not too remote; and, upon the death of the said *Elizabeth*, "without leaving issue, then" the said slaves became the property of, and should have been equally divided among, the surviving daughters the said *William*; and that *Catharine Taylor*, (who intermarried with *Oswald Newby* deceased) and *Anne C. Taylor*, derived no title to the slaves bequeathed to them by *Elizabeth Chowning*; she having no right to devise them; that the rights of *Catharine Chowning* and *Lucy Street*, in the said slaves, survived to them, as to their respective interests therein, upon the death of their husbands, which rights were protected from the effect of the act of limitation, or of length of time, by their coverture; but that *Churchill Blakey* lost the interest, which he was entitled to in the said slaves in

(1) Note.—See 3 H. & M. 57. But whether that gift was absolute, or with a reservation of a right to dispose of the slaves by a Will, does not appear.

“right of his wife, upon the principles and for the reasons stated in the report of the case in the Court of Appeals.”

JANUARY,  
1818.

Blakey

From this Decree, *Blakey* appealed.

Newby's administrators.

*Wickham* for the appellant. This case now comes up, on an appeal from a decree in Chancery; and is totally different in facts and principles from that formerly before this Court. There was no evidence of the special agreement in that case; and if such evidence had been adduced, it could not have availed at law.

The following points are relied upon by the appellant;

1. That the Act of Limitations is no bar to the recovery of Mrs. *Blakey's* share:

2. That the decision in *Newby's administrators v. Blakey* is no bar, nor even a precedent against him, suing as her administrator:

3. That a Court of Equity ought to decree a specific execution of *Newby's* agreement, that the negroes should be given up at his death.

First, the act of Limitations is no bar. The assent of *William Chowning's* executors to the bequest to *Elizabeth Chowning* the tenant for life, enured to the benefit of those in remainder, (a) who, at her death, had the right to take possession without intervention of the Executors. *Blakey's* right as administrator of his Wife, never accrued until the death of the latter: (b) his surviving her gave him nothing in his own right, but only as her administrator. If she had owed debts to the full value, the property would have been liable for it in his hands. A husband representing his wife is, according to clear principles of law, not barred by the act of Limitations. He sues in her right.—she, during the coverture, was protected by the saving in the Act. If she had survived him, her right would certainly have been saved.—Surely, his surviving her does not prevent her estate from having the same benefit.

(a) *Adams v. Pierce*, 3 P. Williams, 11, 4 Bac. 445, citing 8 Co. 96, *Mason's case*.  
(b) *Wab lace v. Taliaferro*, 2 Call 478.

Besides, the act is not pleaded. It may be said that in defining this is not necessary; but whether such be the law, is questionable. In 1 *Saund.* 293, note 2, *Duppe*

JANUARY, 1818.

Blakey

Newby's adm-  
nistrators

(c) Chap-  
mans v.  
Chapman, 1  
Munf. 398.

v. *Mayo*, Sergeant *Williams* says, that, in his opinion, a party relying on the Act ought in all cases to plead it.

*Mrs. Blakey* was no party to the suit at common law; nor was her right affected by it. The record in that suit could not be given in evidence against *her*(c) and though it is inserted as an exhibit in this cause, it is to be considered according to its legal effect only. Suppose *Blakey* had afterwards bought the slaves of *Newby*, would the former decision be a bar to a claim founded on this new title?—But, if the judgment be a bar at law, it is not, in equity; for the slaves were delivered by mistake, and therefore relief ought to be given.

3. The special agreement was obligatory, for the consideration was sufficient.(d) The only question is whether, in point of fact, the agreement be proved. It is in proof that *Blakey* strictly complied with it's terms on his part, by refraining to bring the suit in *Newby's* life time. It may be said, that he might have sued at law after *Newby's* death, the bar of the Act of Limitations being done away:—but he never could have sued for the slaves at law, though his wife might, if she had survived him. *Detinue* would not lie in his favour, the contract not being executed, but executory. His only remedy was *assumpsit* for breach of the agreement, or bill in equity to compel specific performance. Such a Bill may be maintained upon an agreement to deliver slaves, though not for stock in the funds.

*Green* for the appellee. The former decision of this Court is a complete bar to the claim now in question; upon the principle that a party shall not avail himself in equity of that of which he might have had the benefit at law. In the suit brought against him by *Newby's* administrators, *Blakey* might have set up in defence, whatever title he had. I admit that, if his title had been acquired since the trial at law, the Judgment would have been no bar:—but he is precluded from now asserting any right which he then had, and failed to assert. Though joined in this suit with other plaintiffs he was party to that in all the characters he could possibly have sustained:—the decision is therefore conclusive as to him.

(d) *Stapleton v. Stapleton*, 1 Atk. 10; *Penn v. Lord Baltimore*, 1 Vesey sen. 144, 450; *Pullen v. Ready*, 2 Atk. 587; *Goilmere v. Battison*, 1 Vern. 48; *Cann v. Cann*, 1 P. Wms. 727; *Newland on Contracts*, 78, 79, 111; *Nelson v. Nelson*, 1 Wash. 136; *Chichester's ex'x v. Farr's adm'r*, 1 Munf. 98.

JANUARY,  
1818.

Blakey

v.

Newby's ad-  
ministrators

A promise to leave property by Will, does not prevent the act of Limitations from being a bar in detinue. *Blakey* endeavoured to avail himself of it, in the case at law, without success. In that case it was decided that the five years possession gave an *absolute title*. The promise too, was a mere *nudum pactum*; for, at the time it was extorted from *Newby*, he had an absolute title to the negroes;—a title that was not doubtful; but, for the sake of peace, he said, if they would not sue him, he would leave them the property by his Will. The parties on both sides must have known all the facts. There was, of course, no consideration for the agreement. And if it could be supported at law, it is, at any rate a *hard contract*, which a Court of Equity is not bound to enforce:—It has a discretionary right in such cases.

But, independently of all these questions, the right of *Newby* under *Elizabeth Chowning's Will* was good: for neither the Will of her father, nor the act of any other person could take away her absolute title founded on five years' possession under the *parol gift* in 1788.(2)

*William* in reply. Two other sisters have recovered by the same title by which we claim, and no objection was made. There can not be a clearer title than our's, if the case of *Newby's administrators v. Blakey* be not against us. *Elizabeth Chowning's* possession was not adverse to our claim, which commenced at her death.

No laches can be imputed to a married woman. The wife of *Blakey* was no party to that suit. If he failed to make the defence founded on her right, it was not her fault but his: and her right is not barred. The suit was against him *individually*. If he had sued in her right, and got a judgment, and died in her life time, it would have survived to her benefit; for the property would not have been his, unless he had reduced it into possession.

January 18th, 1818, Judge ROANE pronounced the Court's opinion.

(2) Note. She lived about five years after that parol gift; *William Chowning* her father made his Will in July 1784, and died in 1786; she made her Will in January 1784, and died in 1788. See 3 H. and M. 57, 58.



JANUARY,  
1818.

Blakey

v.

Newby's ad-  
ministrators.

The Court is of opinion, that, altho' *Oswald Newby's* possession of the slaves in controversy, for more than five years after the death of *Elizabeth Chowning*, was competent to give him a title thereto, (as was decided in the cause, the proceedings in which are an exhibit,) it does not affect the rights of persons coming within the exceptions of the act of limitations. In this predicament were *Mrs. Street*, *Mrs. Chowning* and *Mrs. Blakey*, by reason of their coverture: unless, in relation to the two latter, their rights respectively were extinguished in favour of their husbands, in consequence of the said slaves having at any time come into the possession of their said husbands. As to the possession, acquired by *Churchill Blakey* and *John Chowning*, of the slaves of *Elizabeth Chowning*, after her death, and which were transferred to *Catharine Taylor* and *Anne C. Taylor*, (under whom *Oswald Newby* claimed,) under a misconception of the title thereto, that possession enured to them, only in their character of Executors of *Elizabeth Chowning*, and not in right of their wives under the will of their father: nor is the case different as to the possession acquired by *Churchill Blakey* in and to a part of the slaves in controversy, and which gave rise to the action of detinue in the District Court of King and Queen. That possession is, ~~also~~ to be referred to his character of Executor of *William Chowning*, and did not enure to him in his character of husband. The case of *Wallace v. Taliaferre* (2. Call) is conclusive to shew, that, when these two characters concur in the same person, this conclusion will follow, unless there be some election, or some act indicative of an intention to take in the character of husband. That principle applies emphatically to cases like the present, where the right as husband, did not attach, specifically, to all of the slaves in question, but only to a part of them, after they should have been divided or allotted; and in which the possession of them in mass accords strictly with the party's claim as Executor.

In this view of the subject, the right of *Mrs. Blakey* in and to the slaves in controversy, did not come in question in the action in King and Queen, and ought not now to be barred or affected thereby. Her husband defended

that suit in his own right, and not in her's. If she had survived him, her right would certainly not have been affected thereby; nor is the right of her administrator so affected, in the contrary event, altho' that administrator is her husband, who was a party to the former action. In this case, the maxim that "when two rights concur in the same person, they are to be considered as if they were in different persons," strictly applies. Her administrator in this case was not a party to the former suit, nor is he a privy to any who was. Nothing done in that suit, therefore, ought to bind him. On this ground, the Court is of opinion, that the said decree is erroneous, and that the appellant ought to be let in to recover his share of the slaves in controversy.

JANUARY,  
1818.

Blaney

Newby's ad-  
ministrators.

Decree reversed, with costs, and cause remanded to the Court of Chancery, to be finally proceeded in pursuant to the principles of this Decree.

### Waller against Long.

Decided,  
Jan. 20th  
1818.

THIS was an action of debt brought by the appellant, as assignee of *Daniel B. White*, against the appellee, in the County Court of Spotsylvania. It was brought upon a bond bearing date the 17th March 1806, in the penalty of 363l. 19s. 6d. conditioned for the payment of 194l. 9s. 9d., on or before the 25th of December 1808, "with interest from the date if not punctually paid." The defendant, after oyer of the bond, pleaded "payment."

On the trial of the cause, the defendant produced a witness to prove that, at the time of executing the bond, it was agreed, that he should have a credit till 25th Dec. 1808, and that that credit was a constituent part of the additional penalty, and not recoverable. *Accord. Allays v Judah & Munf. 496.*

2. The clause in our Act of Assembly, (R. Code of 1819, c. 198, § 83, p. 509,) which prescribes the sum for which judgment is to be rendered on a bond, meant that, in cases of penalties by way of security, the final justice of the case should be obtained in the Courts of law, in effectuating which object, those Courts are to be governed by the same considerations which influence the Courts of Equity.

1. If a bond be given in the usual form with a penalty, conditioned to be discharged by payment of the principal at a future day, "with interest from the date if not punctually paid," such back-interest is to be considered an

LAWSON,  
1818.

Waller  
v.  
Long.

contract by which the debt in question was created. The Court excluded this evidence from the Jury, and the defendant excepted. The Jury returned a special verdict, in which, after finding the execution of the bond; the assignment of it to the appellant before the day of payment; several payments, amounting to 46*l.* 13*s.* 0*d.* on and before the 25th of December 1808; and sundry payments thereafter; they submit the question to the Court, whether the appellant is entitled to recover interest upon the sum mentioned in the condition of the bond, from the day of the date thereof, or not. In the former event, they find for the appellant the debt in the declaration mentioned, to be discharged by the payment of 36*l.* 2*s.* 7*d.*; in the latter, by the payment of 2*l.* 10*s.* 1*d.*, with interest, in either case, from the 20th of Oct. 1809.

Upon this verdict, the County Court held the affirmative opinion, and gave judgment for the larger sum found by the Jury. They gave judgment for the interest from the date of the bond, calculated upon the whole sum mentioned in the condition, altho' 46*l.* 13*s.* 0*d.* of it had been paid on and before the day on which it became due and payable.

On an appeal, the Superior Court of law for the County reversed the judgment, and rendered judgment for the smaller sum; from which judgment an appeal was taken to this Court.

*Writ* for the appellant. Interest from the date was recoverable as a matter of special contract, perfectly understood by the parties, not as a *formal* part of the instrument, but one to be executed. Such bonds are in conformity with the constant practice and custom of the country, which, in such cases has been considered as decisive of the law.<sup>(a)</sup> Even the set-offs in this Record, are calculated in the same way. Being the contract of the parties, it must be carried into effect, unless it be against some rule of law.

A bond of this description is not *usurious*; 1. because it is evidence of a *debt existing at its date*, from which time interest, therefore, would have run if nothing further had been said:—a future day for payment, is indeed given, but upon the express condition of paying interest from

(a) *Fletcher v. Edwards*, 4 Cowp. 112.

the date, if the principal be not punctually paid; which interest is only at the legal rate:

2. Because the back interest is required upon a contingency, by which the obligor might have discharged himself altogether; (b) and interest depending on such contingency, even though above the legal rate, must be paid : (c)

3. Because, to constitute Usury, there must be proof of borrowing and lending. (d)

But if Usury existed in the contract, and even were apparent on the face of the bond, the objection cannot be taken without being pleaded. (e)

Neither is the back interest to be considered as a penalty, and therefore not recoverable. It is not a penalty in reason, or in the understanding of the parties. The penalty is generally understood in this Country as intended, only to enforce compliance with the condition.— The condition is always regarded as containing the contract itself. This bond has a penal part, independently of the condition. What motive could the parties have to insert another penalty? It was clearly not intended as such, but in the light of a liquidated satisfaction in damages. It is easy to imagine countless cases, where the interest from the day appointed, is no satisfaction for the injury sustained by default of payment.

I have not found any case decided in a court of law on the point relating to back interest; but there are cases analogous in principle.—*Ex. gr.* a contract was sustained, by which the purchase money for a tract of land was to be paid by instalments; and in the event of failure to pay any one instalment, the whole was demandable immediately. (f) Was not that a more highly penal agreement than this? In *Gowlett v. Hansforth*, 2 Bl. Rep. 956, the principal and interest were both made payable at an earlier period, in consequence of the failure to pay the instalments punctually.

The case of *Shode v. Parker*, 2 Vern. 316, is the first and last I have been able to find, in which a distinction is taken between a contract for reducing the interest upon compliance with the times of payment, and one where

JANUARY,  
1818.

Waller  
v.  
Long.

(b) 1 Hawk.  
527, c. 28 §  
3, Pollard v.  
Baylor, 4 H.  
Ex M. 223.

(c) Bur-  
ton's case, 5  
Co. Rep. 69,  
(a) Floyer v.  
Edwards,  
Camp. 112.

(d) Price  
v. Campbell,  
2 Call 210.

(e) 1 Saund.  
295 b. note  
(1.)

(f) Blake  
ex'r of Dale  
v. Lawrence,  
4 Esp. Rep.  
147.

JANUARY,  
1818.



Waller

v.

Long.

the interest is to be *increased* if not paid at the day.—  
The *quære* annexed by *Vernon* is a complete answer to the case; for there is no difference in reason, or the nature of things between the two contracts. The motive to pay, and the advantage from paying, is the same in both cases. In fact, it is a distinction without a difference, *and* dis-  
countenanced by other decisions.(g)

(g) *Holifax*  
*v. Higgins*, 2  
*Vern.* 134;  
*Burton v.*  
*Stanton*, 5  
*Brown's*  
*Parl. Cases*,  
233; *Powell*  
*on Mortg's.*  
962-3.

*Stanard contra.*—Upon the true understanding of what is meant by a *penalty*, must depend the correct decision of this case. A *Penalty* is the forfeiture of something not estimated by the amount of advantage gained on one side, or of loss sustained on the other. Courts of law have, under the Statute, the same power to relieve against penalties that Courts of Equity have.(h)

(h) *Bona-*  
*fous v. Ry-*  
*bol*, 3 *Burr.*  
1374.

In this case is the reservation of back-interest to be re-  
garded as a liquidated compensation in damages, or as a  
Penalty? If *any part* (however small) of the principal  
be not paid on the day appointed, interest on the whole  
sum is demandable *from the date*, according to the terms  
of this bond! Is this any measure of *compensation*? Does  
it not answer exactly to the description of a *penalty*? Is  
there any difference between a contract to pay interest  
from the date in case of default, and a contract to pay a  
certain additional sum in the same event? It is still the  
*agreement of the parties*. The usual penalty itself, is an  
*agreement of the parties*—yet the Court of law mitigates  
its rigour.

The main force of Mr. *Wirt's* argument is a supposed  
custom of the Country. I deny the existence of any such  
custom; having always understood it a question concern-  
ing which the best informed members of the profession  
have differed. But if there be such a custom, it ought to  
be shewn to the court, as the particular custom was in  
*Floyer v. Edwards*. In that case, the custom was mat-  
ter of evidence that there was no corrupt purpose of eva-  
ding the Statute. Even in that case, the court, though  
it decided the contract not to be usurious, yet said the  
surplus was not recoverable in *assumpsit for money had*  
*and received*, which is an equitable action.

If such claims can be supported in Courts of law,

where is the guard to protect parties from the effect of agreements to pay penalties? If A owes B 100*l.* and B tells him that, if he will pay him 50*l.* to morrow, he will relinquish the debt; he is not bound to do so, if the 50*l.* be not paid. But there is a distinction between a case where the creditor is willing to relinquish part of the debt in consideration of punctual payment, and one where the debtor agrees to pay *more* than the debt, if he fail to be punctual. This is the distinction recognized in Courts of Equity. If there was no penal part, in the usual form, in the bond, and it simply was, "I A. B. bind myself to pay 50*l.* twelve months after date; and, if I do not punctually pay that sum, I will pay interest upon it from this date;"—such interest would clearly be considered a penalty.

JANUARY,  
1818.

Waller  
v.  
Long.

In *Burton v. Slatten*, 5 Bro. Parl. Cases, 233, the sum allowed had every appearance of liquidated damages.—Not so here; for the interest may be demanded during many months, on the whole amount, for a default of one moment, and as to one cent!

If a debtor was to contract, *expressly*, to pay *all* damages the creditor should sustain by his failure to pay the money on the day; the creditor could nevertheless recover no more than the lawful interest. Yet Mr *Wirt* contends for a sum to be added, by *implication*, as a liquidation of such damages!

In *Halifax v. Higgins*, 1 Vern. 134, the one per cent additional interest was a compensation for failing to pay the interest regularly.

The distinction I have mentioned, is fully supported by the authorities. (i) And no case can be found where retrospective interest is permitted to be added to the sum stipulated by the condition. To do this would be to allow a forfeiture. In *Gowlett v. Hansforth*, 2 Bl. Rep. 958, it was not a forfeiture, and the Court went expressly upon that ground.

It appears on the face of this special Verdict, that the Jury have mis-calculated the set-offs. They have submitted one question only; whether the *whole* back interest is to be recovered, even though *part* was punctually

(i) 15 Vi.  
ner, 453, pl.  
1; *Holles v.*  
*Wyse*, 2  
Vern. 289;  
*Nicholls v.*  
*Maynard*, 3  
Atk. 519;  
*Brown v.*  
*Barkham*, 1  
P. W'ms.  
653; *Bona-*  
*fous v. Rybot*  
3 Burr, 1372.

JANUARY  
1818.

Waller  
v.  
Long.

paid. At all events, such interest ought not to be charged on so much as was paid on or before the day appointed.

Wirt in reply.—My impression is, that if a payment in part be made on the day, the creditor is entitled to the back interest on the sum remaining due only. I have understood the custom of the country to be so; and such appears to be the equitable standard. If in this I am mistaken, and the practice has been to enforce the contract strictly, I insist upon it as my client's legal right upon the authority of *Blake v. Lawrence* 4 Rep. Rep. 147, before cited.

As to the custom of the Country, it was said in *Long v. Colston* 1 H. & M. 115, that a general custom was not to be proved. In *Floyer v. Edwards*, the custom was special, and therefore proof was required.

The distinction taken in Courts of Equity, relied upon by Mr. Stanard, is a distinction without a difference.—The stipulation in both cases is that, although the interest would otherwise run from the date of the bond, the plaintiff will give it up, if the principal be punctually paid. If a bond be given, conditioned to pay at a future day, with interest from the date, and an endorsement be made, that, in the event of payment of the principal on that day, the interest shall be remitted; such bond and endorsement would amount to the condition of this bond exactly. And, according to the case of *Shermer v Beale*, 1 Wash. 11, 14; such endorsement is to be considered as incorporated with the bond.

The distinction therefore, being unreasonable, ought not, (as Judge ROANE said in *Baring v. Reeder*, 1 H & M, 162,) to be considered as of binding authority. But, even according to the British decisions,—in *Halifax v. Higgins*, the interest was to be raised in case of failure in punctuality; yet the Court allowed the higher rate, not as the legal standard of interest; but on the ground that such was the contract of the parties. In *Nicholls versus Maynard*, Lord Hardwicke, (by way of an obiter dictum, for it was not necessary to the decision in that cause,) does indeed recognize the distinction. In *Blake v. Lawrence*, not only the time of commencement of the interest

JANUARY,  
1818.

Waller  
v.  
Long.

was drawn back, but also that of payment of the principal sums; yet the contract was enforced, though more highly penal than this. In *Gowlett v. Hansforth*, there was a forfeiture, in *Mr. Stannard's* sense; but the court decided, that it should be enforced as the contract of the parties. Lord Mansfield, though notorious for a disposition to break down the barriers between the Courts of Law and Equity, no where asserts that he would enforce in a Court of law this distinction adopted in the Courts of Equity. It is a distinction completely overthrown by the cases I have cited.

This case was re-argued by the same counsel, March, 28th 1817, but, from a due regard to brevity, the second argument is not inserted.

January 29th, 1818, Judge ROANE pronounced the Court's Opinion, as follows, after stating the case.

Altho' the testimony offered by the defendant was rejected, and properly rejected, by the Court, the same construction results from the face of the bond itself. The penalty of the bond is conditioned to be discharged by the payment of 194*l.* 9*s.* 9*d.* on or before the 25th of Dec. 1808, with interest from the date, "if not punctually paid." It is evident that the agreement of the parties is completed, before the insertion of these last words "with interest," &c., at least so far as it respects the time of payment, and the sum to be then paid. The sum to be then paid is shown to be 194*l.* 9*s.* 9*d.* only, in exclusion of the back interest, by this consideration, that the payment of that sum on or before the 25th of Dec. 1808, would have discharged the penalty of the bond. These last words were only inserted to enforce, more effectually, the payment of the principal; to add to the penalty, by which the payment thereof was already secured. That is no part of the sum agreed to be paid on a given day, which only becomes payable after that day, and in the event that payment is not punctually made on the day. It is only a penalty.

The Court understands it to be a clear principle, that the clause in our Act, (1 Rev. Code of 1794, p. 111,) which prescribes the sum for which judgment is to be rendered on a bond, meant that, in cases of penalties by way of



JANUARY,  
1818.

Waller  
v.  
Long.

security, the final justice of the case should be attained in the Courts of law, for which, before, parties had been driven into the Courts of Equity. The Court is also of opinion, that, in effectuating this object, those Courts are to be governed by the same considerations which influence the Courts of Equity. If any authority is wanting to support this clear position, it may be found in the case of *Bonafous v. Rybot*, 3 Burr, 1373, in relation to the English statute of 4 and 5 Anne, ch. 16, which is substantially similar to our Act.

The principle of Equity upon this subject, is, that, where the condition is for the payment of a sum of money at a certain time, if it is not paid, the Court will allow interest upon it, from the day *when it should have been paid*, and considers the forfeiture as a penalty which is a subject matter of relief, (2 Fomb. 388.) Equity does not give more than the sum agreed to be paid, with interest thereupon from the *time when it ought to have been paid*. This is the just measure of repairing the breach of the agreement: all beyond it is relieved against, as being, in effect, a penalty.

Under the influence of this principle, while it was held, in the case of *Nicholls v. Maynard*, 3 Atk. 521, that, where a mortgage was made reserving 5 per cent. interest, with an agreement to abate one per cent. in case of punctual payment being made, if payment at the time is not made, the five per cent. is payable, (for it was *reserved*, and the condition of abatement has not been complied with;)—it was also decided that, if four per cent. only had been reserved, with a proviso or condition that, in case of non-payment by a certain time, the interest should be *increased* to five per cent., such proviso would not have been good; because, continue the Court, “where the interest is to *be increased* if the money be not paid on the day, that is *“but as a nomine pænæ*, and relievable in equity.” Where the greater sum is reserved, if the condition of abatement is not strictly complied with, it is to be paid; because it is reserved, and a contrary decision would contravene the agreement of the parties; but the greater sum is not to be paid where it is only reserved to enforce the payment of the smaller, which alone forms the measure of the con-

tract of the parties. In other words, the agreement of the parties is to prevail, so far as it respects the sum agreed to be paid: it is to be relieved against, so far as it partakes of the nature of a penalty.

JANUARY,  
1818.

Waller  
v.  
Long.

These positions, supported by all the authorities, are decisive of the case before us. The party is to get only that which he would have received, had the contract been duly complied with, and legal interest thereupon from the time when it should have been paid. All beyond is in the nature of a penalty, and relievable against, by the principles of equity. The cases which shew that the rate of interest can not be *increased*, equally shew that the *back* interest can not be given: it will not be given unless it is *reserved*, as a part of the contract.

On these grounds, the Court is of opinion, to affirm the judgment of the Superior Court.

### Lanier against Harwell.

Decided,  
Jan. 22d,  
1818.

IN *assumpsit*, the plaintiff declared upon a *parol* agreement between the defendant and him, "that if the plaintiff would furnish and supply a certain Mary Hunnicutt, Littleton Hunnicutt and Edward Hunnicutt, with board, washing and lodging for one year, he the defendant would pay the plaintiff as much money, as he, for the board, washing and lodging aforesaid, reasonably deserved to have";—averring performance on his part; that he reasonably deserved to have for the same the sum of 61*l.* 10*s.* 0*d.*; and non-performance by the defendant. At the trial, on the plea of *non assumpsit*, the defendant moved the Court to instruct the Jury, that he was not responsible for the board of the persons in the town time, he the defendant would pay him for it; averring and proving that he furnished the board, washing and lodging accordingly:—and this, altho' the woman's husband be in the Commonwealth at the time, and bound to furnish her and the children with necessaries; and the defendant be not morally or legally bound, but by his said promise.

1. A plaintiff in *assumpsit* is entitled to recover upon a *parol* agreement of the defendant, that, if the plaintiff would furnish and supply a certain married woman and her infant children with board, washing and lodging for a certain time, he the defendant would pay him for it; averring and proving that he furnished the board, washing and lodging accordingly:—and this, altho' the woman's husband be in the Commonwealth at the time, and bound to furnish her and the children with necessaries; and the defendant be not morally or legally bound, but by his said promise.

2. It seems, that a verdict for a certain sum of money, with interest from a day specified, "subject to a credit," (without saying on what day such credit is to be applied,) is not so uncertain as that the plaintiff cannot take judgment upon it.

3. A judgment, in such case, for the damages aforesaid in form aforesaid assessed, sufficiently follows the verdict.

JANUARY,  
1818.

Lanier  
v.  
Harwell.

declaration mentioned, unless the plaintiff could produce a promise in writing to that effect:—but, “the contract having been made by the defendant himself, and the said persons being in law incapable of contracting themselves, one being a *feme-covert* and her husband in this State, and the others *infants* and their children, the Court refused to give the instruction:”—to which opinion the defendant excepted.

The Jury found a verdict for the plaintiff for 65*l.* damages, with legal interest from January 1st, 1808 ‘till paid, (“subject to a credit of the sum of 25*l.* 11*s.* 6*d.*”) besides Costs. The judgment was, “that the plaintiff recover against the defendant his damages aforesaid, in form aforesaid, assessed, and his Costs” &c.

In a Petition for a *Supersedeas*, the defendant contended there was error in the Judgment; 1st, “because it did not appear, from the plaintiff’s allegations, that there was any moral or legal obligation whereby the defendant was bound to support Mrs. *Hunnicut* and her children; and she was a married woman; and her husband and the father of her children was in the State of Virginia, who was liable for necessities furnished his wife and children:”—2d, “because there was no promise in writing whereby the defendant bound himself to be responsible; and, if he made the promise, it was a *nudum pactum*, not susceptible of enforcement either at law or in equity:” 3d, “because the jury, in their verdict, allowed a credit for 25*l.* without stating at what time, and consequently it was impossible to know how an estimate of the interest was to be made:” and 4th, because the judgment “of the Court did not pursue the verdict of the Jury.”

The Judge of the Superior Court of law granted the *Supersedeas*, and afterwards reversed the judgment, and directed a new trial, on the ground, “that the Verdict was uncertain in not fixing the time when the credit of 25*l.* 11*s.* 6*d.* was to be allowed.” From this Judgment of reversal, the original plaintiff appealed to this Court: but, before the decision, “he offered, in the Superior Court, to admit, and enter on record, that the

"credit of 25l. 11s. 6d. was to be applied as a Credit  
 "on the 1st of January 1808; which, as his release of the  
 "damages aforesaid, (except as to the sum of 39l. 8s. 6d.  
 "with interest from that day,) was, on his motion, al-  
 "lowed to be entered of record."

JANUARY,  
 1818.

Lanier  
 v.  
 Harwell.

This Court (without argument) reversed the Judgment  
 of the Superior Court, and affirmed that of the County  
 Court.

### Munford against Rice and others.

Decided,  
 Jan. 23, 1818.

ON a motion by *James H. Munford* late High Sheriff  
 of Nottoway County, against *James Rice*, and sundry  
 persons his sureties, it appeared (*inter alia*,) from the  
 notice and several bills of exceptions, that the plaintiff's  
 motion was for the amount of a Judgment obtained against  
 himself, in behalf of the Commonwealth, for part of the  
 Revenue Taxes in the said County for the year 1815,  
 which the defendant *Rice*, as his deputy, had collected  
 and failed to pay into the public Treasury within the time  
 required by law; that the bond given by the said *Rice*  
 and his sureties, bore date the 10th of October 1813, and  
 was conditioned for performance of his duty, indemnify-  
 ing the said *James H. Munford, &c.*, "during his con-  
 tinuance in office," without specifying the length of  
 time; that the said Bond was executed in consequence of  
 the appointment and qualification of the said *Rice* as De-  
 puty Sheriff in October 1813; that he did not continue in  
 office more than one year, under that appointment, but  
 was appointed again on the 6th of October 1814, to act

1. A Bond from the Deputy to the High Sheriff, conditioned for the faithful performance of his duty as deputy, "during his continuance in office," without specifying the length of time, is binding on him and his sureties for the transactions of one year only. (1)

(1) Note. It appears that the marginal Epitome pl. 1. to the case of *Bogator v. Louke*, 2 *Munf.* 280, is not correctly expressed. It should be as follows:—"A Bond from the deputy to the High Sheriff, dated November 15th, 1802, and conditioned for the faithful performance of his duty as deputy, "during his continuance in office, until November Court 1804," was adjudged binding upon him and his sureties, for the second year as well as the first, and until the winding up of the business lawfully committed to him as deputy."

JANUARY,  
1818.

Munford,  
v.  
Rice and  
others.

as deputy Sheriff for another year; that the said *Munford* the High Sheriff, also, did not *continue* in office longer than one year under his first appointment, but, at the end of the first year, was again commissioned and qualified; viz, on the same 6th day of October 1814. The sureties therefore contended, that the said *Munford* could not delegate to the said *Rice* an authority to act as deputy Sheriff for a longer period of time than his own office continued; and, consequently, that the said bond could not be binding upon them for the second year in which the said *Rice* acted as the deputy of the said *Munford*; and that there was nothing in the said bond to shew their intention to be bound for such second year.

The County Court gave judgment for the plaintiff, which, upon an appeal to the Superior Court of law, was reversed, and judgment was ordered to be entered for the defendants; whereupon the plaintiff appealed to this Court.

*Wickham* for the appellant.

*May* and *Leigh* for the appellees.

January 23d, 1818, Judge ROANE pronounced the Court's Opinion.

The Court is of opinion that this case does not come withing the decision of the Court, in the case of *Royster v. Leake*; in which the condition of the bond stated that the deputy Sheriff was to act as such until *Goochland November Court* 1804, and that stipulation was considered as added to, and extending the expression, "during his continuance in office," beyond the year for which his principal was first appointed; and which, in this private contract between the Sheriff and his Deputy, it was competent for them to do. That stipulation is wanting in the case before us; and this case falls within the principles of that of *Fairfax v. the Commonwealth*, 4 H. & M. 208., in which the expression aforesaid was limited to the first year. The Court is also of opinion, that it is not natural to give, to this general expression in the bond of the Deputy Sheriff, an extension beyond the term for which his principal himself held his office.

On this ground, and not deciding any other point occurring in the case, the Court is of opinion to affirm the judgment of the Superior Court.

## Fitzhugh and Grinnan against Jones.

Decided  
Jan. 28th  
1818.

This case was argued at great length, during six days, by *Green and Wickham* for the appellants, and *Stanard, Call and Leigh* for the appellee, in the absence of the Reporter. But, from the transcript of the Record and the opinion of this court, it appears that the only important point in controversy between the parties, was whether *Jones*, (the plaintiff in the suit in the superior court of Chancery for the Fredericksburg district) had made with the defendant *Fitzhugh* a complete and binding contract for the purchase of a tract of land of his (called Clark's) before a sale was made of the same land by the said *Fitzhugh* to the defendant *Grinnan*. The bill was filed by *Jones*, on the ground of his prior bargain, to set aside the sale to *Grinnan*, and for a conveyance of the land to him. The material circumstances of the case, as presented by the bill, answers, exhibits and examinations of witnesses, are sufficiently stated in this Court's opinion.

Chancellor NELSON pronounced the following decree, October 2d, 1816.

"The Court, being of opinion that the contract, alleged by the plaintiff to have been made between him and the defendant *Fitzhugh*, was prior to that made between the defendants, and the defendant *Grinnan*

ty of establishing the lines of the tract; he also acceded to the offered terms of payment, and required the purchaser's answer as soon as possible, in case he was disposed to accede to these terms:—the purchaser's reply stated, that he would take the land on the terms proposed, and would have the lines ascertained; though it went on to express his wish that the owner's agent should attend to the settlement of a part of the boundaries, through motives of delicacy in relation to one of the co-terminous tenants; saying nothing however, of waiving or abandoning his acceptance of the terms proposed. This amounted to a complete and concluded contract for a sale and purchase of the land.

2 The word *immediately* used on this occasion, only meant that the payment should be prompt; in contradistinction to a credit payment. A tender of the money therefore, without any unreasonable delay, was sufficient.

1. A person disposed to purchase a tract of land, wrote to the owner enquiring whether it was for sale, and what were his terms by the acre; stating also the payments it would be convenient for him to make; one of which was to pay \$1000 immediately; the answer to this letter stated the price the owner was willing to take, but that he wished the purchaser to take upon himself the responsibility.

JANUARY,  
1818.

*Fitzhugh &  
Grinnan*  
v.  
*Jones.*

“ had full notice of that contract before his posterior  
 “ contract was carried into effect, and therefore, that the  
 “ said contract between the defendants should not stand  
 “ in the way of the claim of the plaintiff for an execution  
 “ of that between him and the defendant *Fitzhugh*, doth  
 “ adjudge, order and decree that the plaintiff do, within  
 “ ten days from the date hereof, pay to the defendant  
 “ *Fitzhugh*, the sum of \$1000; that the defendants or  
 “ either of them in possession of the tract of land, in the  
 “ proceedings mentioned, do, on or before the first day of  
 “ January next, yield up and surrender, to the possession  
 “ of the plaintiff, the said tract of land, together with all  
 “ the title papers thereof in the possession of them or ei-  
 “ ther of them; and (the plaintiff admitting that the said  
 “ tract of land contains 400 acres, for which, according  
 “ to the terms of his contract with the defendant *Fitz-*  
 “ *hugh*, he is bound to pay at the rate of \$15 per acre,  
 “ and waiving any survey to ascertain the quantity, and  
 “ whether any deduction should be made, according to  
 “ the said contract, for any deficiency,) the court doth  
 “ farther order and decree, that the deed executed by  
 “ the defendant *Fitzhugh* and the defendant *Grinnan*, so  
 “ far as it professes to convey the said land, to the defend-  
 “ ant *Grinnan*, be, and the same is hereby annulled and  
 “ vacated; that the defendant *Fitzhugh* do, at any time  
 “ after the first day of January next, on the request of  
 “ the plaintiff, (he executing to the said *Fitzhugh* his  
 “ bonds, with security to be approved by a commissioner  
 “ of this court, for the payment of \$2500, on the first day  
 “ of January, 1818, and for the like sum on the first day  
 “ of January 1819,) convey to the said plaintiff, at the  
 “ costs of the said plaintiff, the said tract of land, in fee  
 “ simple, with general warranty; excepting from that  
 “ warranty any responsibility on the part of the said  
 “ *Fitzhugh* that may arise from the interferences of the  
 “ lines of the lands of co-terminous tenants or proprietors  
 “ and others; (1.) and that the said defendant *Grinnan*,  
 “ on the like request of the said plaintiffs, do execute a

(1) Note. These provisions were inserted in conformity with the contract.

JANUARY,  
1818.

Fitzhugh &  
Grinnan  
v.  
Jones.

“ deed of release, releasing all right or title he may have  
“ or claim, in and to the said tract of land, in virtue of  
“ the conveyance from the defendant *Fitzhugh* to him.  
“ And the Court doth farther order and decree, on  
“ the execution of the said deed by the said *Fitzhugh* to  
“ the plaintiff, that the plaintiff do execute a good and  
“ sufficient deed to the said *Fitzhugh*, conveying the said  
“ land in mortgage, to secure the punctual payment of  
“ the said bonds; and, in default thereof, that the lien of  
“ the said *Fitzhugh* on the said land for the amount of  
“ the purchase money unpaid and secured by the said  
“ bonds, remain unimpaired; reserving liberty to him, at  
“ any time hereafter, to apply to this court to decree  
“ the sale of the said land for the payment of any part  
“ of the money secured by the said bonds that may not  
“ be punctually paid. And the Court doth in like man-  
“ ner decree, that, at any time after the first day of Jan-  
“ uary next, on the execution, or tender by the defendant  
“ *Fitzhugh* to the plaintiff of such deed as is hereby de-  
“ creed to be made by the defendant *Fitzhugh* to the  
“ plaintiff, the plaintiff do execute the bonds, with securi-  
“ ty aforesaid, to the said *Fitzhugh*, and the said mort-  
“ gage on the land to secure the punctual payment of  
“ those bonds. And the Court doth farther order and  
“ decree, that the defendant *Fitzhugh* pay to the plain-  
“ tiff the costs expended in the prosecution of this suit.”

From this decree, the defendants appealed. The fol-  
lowing was the opinion of this Court, delivered by Judge  
BOANE.

The Court is of opinion, that the letters in the proceed-  
ings contained, viz. one from the appellee to the appel-  
lant *Fitzhugh*, of Jan. 15, 1814; the answer thereto, of  
Feb. 6th, 1814; and the reply thereto, of Feb. 10th, 1814,  
amounted to a complete and concluded contract for the  
land the subject of controversy. The first of these let-  
ters, (written, too, with the assent of *Mr. Brooke* the agent  
of *Fitzhugh*.) enquires of him whether the said land was  
for sale; what were his terms by the acre for the same;  
and states the payments it would be convenient for him



JANUARY,  
1818.

*Fitzhugh &  
Grinnan  
v.  
Jones.*

to make, one of which was to pay down \$1000 *immediately* to Mr. Brooke. The answer to this letter states the price Mr. Fitzhugh is willing to take for the land, but also states his wish that the purchaser should take upon himself the responsibility of "*establishing the lines of the tract.*" He also accedes to the appellee's terms of payment, and requires the appellee to answer the letter "as soon as possible," in case he is "disposed to ACCEDE to the" terms therein stated. Nothing can fall more completely within the idea of an OFFER, than this letter; in coming into the appellee's proposals of payment; in requiring him to answer the letter "as soon as possible," adding as a reason therefor that he had other offers for the said land; and, above all, in wishing to know whether the appellee ACCEDES to these terms. This expression ACCEDE is entirely characteristic of a definite offer of the land, and can not be reconciled to the idea of the letter being only one link of a loose correspondence or treaty relating thereto. The appellee's reply to this letter, which was *promptly* made, states that he will "*take the land on the terms proposed,*" and will have the lines ascertained. He then goes on, however, to express his wish that Mr. Brooke the agent of Fitzhugh, should attend to the settlement of a part of the boundaries, thro' motives of delicacy in relation to one of the co-terminous tenants; not waiving or abandoning, however, his *acceptance* of the terms proposed.

If this Contract is not conclusive for the sale of the land, it is almost impossible that any should be so, which is made by means of letters: it would amount to this, that no contract can be made, unless both the parties are personally present.

As for the criticism upon the word "*immediately,*" used in the first letter, it only meant that the payment would be prompt, and is in contradistinction to a credit payment. The money was tendered without any unreasonable delay; and that delay arose from the intermediate conduct of Fitzhugh in selling the land to another.

With respect to the purchase by Grinnan from Brooke, that agent was not only limited in his power of selling,

but the contract was submitted by *Brooke* to his principal with the knowledge and approbation of *Grinnan*, and was not ratified or concluded by *Fitzhugh* until his previous sale to *Jones* had put it out of his power.

JANUARY,  
1818.

*Fitzhugh & Grinnan*  
v.  
*Jones.*

Of *Jones's* purchase, *Grinnan* was well apprised at the time his purchase was completed, and therefore he can not stand on higher ground in relation to it, than Mr. *Fitzhugh* does from whom he purchased.

As to the objection that this contract should not be enforced because it violates the law respecting pretended titles, it is to be remarked that this point is not put in issue by the pleadings, nor had the appellee such notice of it as would enable him to meet and obviate it. It is also to be remarked, that it would be much too rigorous to vacate the sale of a large tract of land, altogether, because on one of the out lines (perhaps,) a few acres might chance to be holden *adversely* at the time, and which arises too, (for aught appearing to the contrary) from a difference of opinion as to the true position of a given boundary.

The decree is therefore affirmed with costs; and the cause is remanded, to be finally consummated between the parties, according to the principles thereof.

### Lewis and others, against Thornton & Wife.

Decided  
Jan. 30,  
1818.

This was a suit instituted in the late High Court of Chancery, in August 1790, by *Anthony Thornton* and *Mary* his wife, to recover a legacy left her by the will of her father *Philip Rootes*, who died in the year 1756. It

1. Adjudged cases can only be safely relied on as precedents, as to points actually in issue

between the parties, and not as to such as may be deemed *extra-judicial*, unless indeed in relation to the latter they shall have ripened into law by various and successive decisions.

2. Where the principles of a decree of the Court of Appeals seem to be opposed to its letter, the literal interpretation ought not to be relied on as a binding precedent.

3. In this case, a general charge upon the estate of a testator, for the payment of legacies, in aid of a particular fund provided for that purpose, was not enforced against *bona fide* purchasers of the lands; after a great lapse of time; because it might admit of a doubt whether, by the terms of the Will, the charge was upon the land itself, or only upon the profits thereof; because the lands might be presumed to be exonerated by requisition of security from the devisees for payment of the legacies; — and, above all, because the testator left a personal estate abundantly sufficient for that purpose; which estate was wasted by the executors.

4. A Court of Chancery ought not to give costs, (against complainants,) to parties erroneously made by its own direction.

JANUARY,  
1818.

Lewis & oth-  
ers  
v.  
Thornton &  
Wife.

was stated in the bill that *Philip* and *Thomas Reid Rootes* qualified as executors, and gave bond with *Richard Shackelford* and *Thomas Thorpe*, as their securities; that they had assets more than sufficient to pay the debts and legacies; that *Thomas Reid Rootes* died in 1762, insolvent; that *Philip Rootes* the younger wasted the assets and died intestate, while a suit at law was pending against him, brought by the complainants, upon his administration bond; and that no person administered on his estate:—that before his death he had mortgaged to *Richard Shackelford* a number of slaves, to indemnify him for becoming his security as aforesaid; that *Thomas Thorpe* and *Richard Shackelford*, having both departed this life, the complainant instituted a suit at law, upon the same administration bond, against the executors of the said *Shackelford*; that *Zachariah Shackelford*, one of these executors, took possession of the estate which *Philip Rootes* the younger left, consisting of the remaining property of *Philip Rootes* the elder; that, in the progress of the suit against *Shackelford's* executors, the cause was by a rule of Court submitted to arbitration, and an award made in favor of the plaintiffs for the sum of 891l. 13s. 4d. with interest thereon from December 1776; which award was made the judgment of the court—that although the said order of reference was made by consent of parties, that fact did not appear in the record; in consequence of which defect, the judgment was reversed by the General Court. The persons made defendants to the Bill, were *Graham Franks* executor of *Thomas Thorpe*; *Zachariah Shackelford* surviving executor and legatee of *Richard Shackelford*, *John Harwood* administrator of *William Shackelford* the deceased executor and legatee, and *Francis Gaines* and *Frances* his wife, and *Richard Talinferro*, and *Elizabeth* his wife, who were also legatees of the said *Richard Shackelford*; all of whom were called upon to account severally for the property which had come to their hands, out of which the plaintiffs prayed satisfaction of their legacy.

*Gaines* and *Wife* demurred to the Bill; alleging that the plaintiff had a complete remedy at law; but the Chancellor overruled the demurrer; whereupon, they filed their answer, rendering an account of so much of the estate of *Richard Shackelford* as they had received.

*Zachariah Shackleford*, by his answer, rendered a similar account; but denied that any part of the estate of *Philip Rootes* ever came to his hands.—He stated that he had been informed and believed, the greater part of that estate was taken possession of and disposed of by a certain *John Rootes*; and that some part of it was taken and carried into Amherst County, by one *Edmund Wilcox*, who forgot or did not choose to return it; that most of the slaves mortgaged by *Philip Rootes* to *Richard Shackleford* as aforesaid, were sold by *Rootes* himself, or died before him; so that, at his decease, only two of those slaves were to be found. He denied that he ever assented to the submission to arbitration, which was made when he was under age, and his brother *William* was the acting executor at that time; but he admitted that, as agent for *William*, he attended the referees. He claimed also some credits, for payments to the plaintiffs by *Philip Rootes* the younger; and contended that no action, either at law or in equity, could be maintained against him, until it should have been established by a previous decision that some default, subjecting the securities, had been committed by the executors of *Philip Rootes* the elder.

JANUARY,  
1818.  
Lewis & others.  
v.  
Thornton & Wife.

The Chancellor having referred the accounts to a Commissioner, a report was returned, in conformity with which, a decree was pronounced, in May 1796, in favour of the plaintiffs, for 391*l* 13*s.* 4*d.* principal, and 72*l.* 13*s.* 2*d.* interest to the 15th of May 1783, besides interest from that day, on the said principal; and it was ordered that, towards satisfaction thereof, the defendant *Zachariah Shackleford*, out of the estate in his hands to be administered of his testator *Richard Shackleford*, should pay 378*l.* 4*s.* 3*d.* with interest thereon from January 1789; the defendant *John Harwood*, out of the estate in his hands to be administered of *William Shackleford*, 76*l.* 11*s.* with interest thereon from the 1st day of Jan. 1776; and the defendant *Richard Taliaferro*, 24*l.* 18*s.* 5*d.* with interest thereon from Nov. 1773; reserving to the two last mentioned defendants, who had not answered, liberty to shew cause against this decree in the term next after being served therewith;—and also reserving liberty to the plaintiffs to resort to

JANUARY,  
1818.

Lewis and  
others  
v.  
Thornton &  
Wife.

the court, in case the principal and interest due should not be satisfied by those defendants, to recover the deficiency against the other defendants.

In May 1799, the Chancellor declared so much of the said decree as related to *Richard Taliaferro*, to be irregular, (since no previous process had been served upon that defendant,) and directed new process; but made the decree absolute against *John Harwood*, who had shewn no cause to the contrary.

By virtue of a farther order of account, another Report was made by a Commissioner in December 1800; whereupon, it was decreed, on the 2d of June 1801, that *Elizabeth Taliaferro* administratrix of *Richard Taliaferro* (who had departed this life,) should pay to the plaintiffs the sum before decreed against him, and the farther sum of 157*l.* 4*s.* 5*d.*, with interest on 87*l.* 15*s.* 0*d.* from October 1795, until payment; and that the defendant *Francis Gaines* should also pay 165*l.* 3*s.* 4*d.*, with interest upon 92*l.* 5*s.* 0*d.* from the period last mentioned, until payment, towards discharge of the principal and interest recovered by the decree of May 14th, 1796:—and the suit was dismissed as to all the other parties, the plaintiffs no farther prosecuting.

From this decree an appeal being taken by the defendants *Elizabeth Taliaferro* and *Francis Gaines*, the Court of Appeals pronounced the following opinion and decree, the 5th of May 1806.

“The Court is of opinion, that the testator *Philip Rootes* having set apart a particular fund for the payment of his debts and legacies, and directed that his whole estate should be chargeable with the payment of the latter, in case that fund should not prove sufficient;(1) and having also required that his sons, to whom he devised his lands and other estates, either in possession, or when they should attain the age of twenty-one years, or in remainder after the death of his wife, should, upon receiving their parts of his estate, give security, (without naming any person to whom such

(1) Note. These provisions appeared in the Will and Codicil.

" security should be given,) for the payment of their pro-  
 " portional parts of their sisters' fortunes;(1) and having  
 " constituted two of those sons, then of full age, his ex-  
 " ecutors, and a third son *John*, when he should come  
 " of age, his executor likewise; the requisition of secu-  
 " rity from those sons, respectively, on receiving their  
 " estates, was thereby frustrated; but security ought  
 " to have been demanded, by those executors, of the testa-  
 " tor's fourth son *George*, when he should receive from  
 " them the estate devised to him; and, in default of  
 " taking such security, the executors or executor, by  
 " whom the estate was delivered, thereby made himself  
 " responsible for *George's* proportion of his sister's  
 " fortunes; and all the four sons of the testator, viz,  
 " *Philip, Thomas Reid, John and George*, their heirs and  
 " representatives respectively, into whose hands any of  
 " the estate of the testator *Philip* deceased was devised,  
 " or came, and any person whatsoever to whom the real  
 " estate of the said testator may have come by gift or  
 " purchase from either of those sons or their heirs, ex-  
 " cept *bona fide* purchasers of the estate devised to his son  
 " *George*, were and are liable to contribution for the pay-  
 " ment of the testator's daughters' fortunes, in case of  
 " any deficiency of the fund set apart by his Will for the  
 " payment thereof:—that the securities of the executors,  
 " *Philip and Thomas Reid Rootes*, are liable in the first  
 " instance, only for the misapplication or wasting of the  
 " funds so constituted by the testator for payment of the  
 " said legacies, in case those executors, their heirs or  
 " representatives, or those into whose hands those funds  
 " shall be found to have been taken, shall be unable to  
 " make good the same; but, in case those funds shall be  
 " found insufficient for the payment of the said legacies,  
 " so as to render the estates descended or devised to the  
 " testator's sons, *Philip, Thomas Reid, John and George*,  
 " liable to a proportional contribution for the payment of  
 " those legacies, and if it shall be found that the said  
 " executors neglected to take such security from *George*,

JANUARY,  
1818.

Lewis and  
 others  
 v.  
 Thornton &  
 Wife.

(1) Note. These provisions appeared in the Will and Codicil.

JANUARY,  
1818.

Lewis and  
others.

v.

Thornton &  
Wife.

“ upon delivering his estate to him, and that the es-  
 “ tate of the said *George*, which can now be resort-  
 “ ed to for his proportional contribution, is insuffi-  
 “ cient, and that the estates or estate of the execu-  
 “ tors or executor, by whom the estate of *George*  
 “ was delivered into his possession, is also insuffi-  
 “ cient to discharge the said *George's* proportion, then  
 “ the said securities of the said *Philip* and *Thomas Reid*  
 “ will be further liable to make good the said *George's*  
 “ proportion of such contribution, and no farther; and  
 “ the balance, if any, which may thereafter remain un-  
 “ paid, must be raised by contribution from those into  
 “ whose hands the estate of the testator has come, by des-  
 “ cent, devise or gift from the testator; or either of his  
 “ four sons before mentioned, or as executor, or execu-  
 “ tor in his own wrong, or as administrator or trustee  
 “ for either of them, or into whose hands his lands may  
 “ have come by descent, devise or purchase, (except  
 “ *bona fide* purchasers of the estate devised to *George* as  
 “ as aforesaid,) according to the value thereof. And it  
 “ is further the opinion of this Court, that, in case it  
 “ shall be found that the sureties of the said executors are  
 “ liable according to the principles herein before stated,  
 “ the heirs, executors and legatees of these sureties, res-  
 “ pectively, ought to be called upon to contribute their  
 “ proportional parts, so far as the estate to them des-  
 “ cended, devised, or otherwise come to their possession,  
 “ may extend; the legatees and representatives of the  
 “ said *Richard Shackelford* being (alone) chargeable with  
 “ the amount of the value of the slaves, or other effects,  
 “ which he or they received from the said executors, or  
 “ either of them, towards indemnifying him on account  
 “ of his surety-ship aforesaid.” The decree was there-  
 fore reversed, and the cause sent to the Superior Court  
 of Chancery held in Richmond, to be proceeded in accord-  
 ing to this opinion.

In that Court, the cause was directed to be placed on  
 the rule docket, and leave was given the plaintiffs to  
 amend their Bill; whereupon, they filed an amended Bill,

stating sundry additional circumstances, and making many new parties, among whom were *Catharine Lewis* and others, (purchasers of lands of, and under *Philip Rootes*, *Thomas Reid Rootes* and *John Rootes*.) Various proceedings, which need not here be detailed, were afterwards had in the Superior Court of Chancery.

JANUARY,  
1818.  
Lewis and  
others  
v.  
Thomson &  
Wife.

The grounds of the subsequent decree of this Court are sufficiently set forth in the opinion and decree itself.

The cause, being transferred to the Court at Fredericksburg, (under the Act of Assembly,) came on to be heard, September 29th, 1815, upon the bill and amendments thereto, the answers of sundry defendants, exhibits, and several reports of Commissioners, and exceptions thereto taken by some of the defendants; whereupon, Chancellor NELSON, over ruling all the exceptions, except one which claimed an additional credit for 110*l*. paid on account of the legacy, "and being of opinion, "since it appears that *Philip Rootes*, one of the executors "of *Philip Rootes* the elder, paid two of the legacies devised to the daughters of his testator respectively, and "that the specific fund, appropriated by the Will of the "said *Philip Rootes* the elder for the payment of debts "and legacies, was exhausted in the payment of debts, "and that the said executor was a large creditor of his "testator's estate upon his administration account, that "therefore the securities of the qualified executors of "*Philip Rootes* the elder, and their representatives were "not, and are not now responsible for any portion of the "legacy due to the female plaintiff, and that the holders "of the real estate of which *Philip Rootes* the elder died "seised, who derived their titles, respectively, from his "three sons *Philip*, *Thomas R.* and *John*, are liable to "contribution for the payment of the value of said legacy, "according to the reported value of the lands respectively so held by them; it was therefore decreed and "ordered that, unless the defendants *Catharine Lewis* "and others, purchasers of those lands as aforesaid, "should, respectively, pay to the plaintiffs certain sums "of money, in the decree specified, on or before the 1st "day of April 1816, persons named as Commissioners, "should, after advertising the time and place of sale,



JANUARY, 1818.  
 Lewis and others  
 v.  
 Thornton & Wife.

“ for three weeks successively, in some newspaper printed  
 “ in Fredericksburg, sell to the highest bidder for cash,  
 “ so much of the lands, so held by each of the said de-  
 “ fendants, of which the said *Philip Rootes* the elder died  
 “ seised, as would be sufficient to pay the respective sums  
 “ decreed to be paid by the said defendants respectively,  
 “ and should pay the same to the plaintiffs, or their  
 “ agent; that the Commissioners acting herein should  
 “ convey the lands sold to the purchaser or purchasers  
 “ thereof, at his or their own proper costs and charges,  
 “ and report their proceedings to the Court.”

From this Interlocutory Decree, *Catharine Lewis* and the other defendants who held lands under *John Rootes*, were allowed an Appeal by the Chancellor.

*Wirt* and *Wickham* for the appellants.

*Green* for the appellees.

January 30th, 1818, Judge ROANE pronounced the opinion of this Court.

The Court is of opinion, that those persons who have been made parties to this suit in consequence of the Decree of this Court pronounced on the fifth of May 1806, are not bound by that decree, either as a decree, or as a precedent, and are now at liberty to shew that the liability to pay the legacy in question, supposed thereby to exist against them, as purchasers of lands under the brothers *Philip*, *Thomas R.* and *John Rootes*, does not exist. It is not binding on them as a decree, because they were no parties to the suit when it was pronounced: it is not binding on this Court as a precedent, because cases adjudged between *other* parties can only be safely relied on as precedents, as to points actually in issue between those parties, and not as to such as may be deemed extrajudicial; unless, indeed, in relation to the latter, they shall, by various and successive decisions, have ripened into law. This would be the case, even if the facts appeared the same after the new parties made, as they did when the former decree was pronounced. In this case, however, as it respects the present appellants, who are understood to be persons holding as *bona fide* purchasers under *John Rootes*, altho' the decree may bear the inter-

pretation, taking it *literally*, that the mere nomination of *John* as an executor, frustrated the requisition of the Codicil that he should give security on receiving his estate, yet even that is doubtful. Neither the original bill, nor the answers thereto, mention *John's* nomination as executor. The Bill merely states, that *Philip* and *Thomas R.* were appointed Executors, and qualified and gave securities, the representatives of which securities are sought to be charged; and the answers admit these facts.

JANUARY,  
1818.



Lewis and  
others

v.  
Thornton &  
Wife.

The Decree states, that the three sons were appointed Executors, and that thereby the requisition of security from those sons was frustrated; but that security ought to have been demanded by *those* executors of the testator's fourth son *George*, when he should receive from *them* the estate devised to him, and that, in *default* of taking such security, the Executors made themselves responsible for *George's* proportion. Now, if *John*, never qualified as Executor, (and this is positively averred in the the answers of many of the defendants,) he could neither be the person who was to deliver the estate to *George*, nor could he be *in default* for not taking a bond which he had no right to require; any more than *John Robinson* and *Humphrey Hill*, who were also named as Executors, but who never qualified, could be made responsible for such default. The Court may have supposed, therefore, that it might thereafter appear that *John* had qualified: but, be this as it may, the *principle* of the Decree is to throw the responsibility on the party *guilty of default*; and, if the qualified Executors had as much right to demand security of *John*, on receiving his estate, as they would have had to demand security of him had he purchased at the sale of the estate, and if no Court would have decreed a delivery to him of his estate, without security, if demanded by the Executors, which is believed to be undeniable, then they were equally *in fault* in not taking security from *him*, as from *George*. Suppose neither of the sons had qualified; but that *Robinson* and *Hill* had qualified, or administration with the will annexed, had been granted; ought those Executors, or the administrator to have delivered over the estate to *Philip, Thom-*

JANUARY,  
1818.

~~~~~  
Lewis and
others

v.
Thornton &
Wife.

as R. and John, without security, merely because they had been named as Executors? Why shall the mere nomination, made too in the body of the Will, of the sons as Executors, frustrate the codicil, made afterwards, requiring security? Not because the two provisions can not stand together; for, if so, the Codicil, which speaks of all the sons, would abrogate their appointment as Executors. It must be on the ground that, when those Executors qualify and give bond, which invests them with the whole personal estate, and secures it's faithful application according to the Will, no farther security was necessary. The Will having charged the whole estate with the payment of these legacies, altho' it had previously given some specific legacies and the residue of the slaves and personal estate to the sons, ought, as to the slaves and personal estate, to be considered as a bequest of the *residuum* to the sons after payment of debts and legacies, and which the executors would be bound to see so applied, except so far as they might be eased therefrom by the codicil, which authorises a delivery over, on bond being given. This, where it could be done, if good security was taken, would exonerate them from actual payment; but, where that could not be done, as in case of qualified Executors, who could not give bonds to themselves, the proper application of the fund must be made in the course of administration, and for which, or for default in not taking bond, their securities would be answerable. The *principles* of the decree would then seem to be at war with it's letter, if it will bear the literal interpretation insisted on; and consequently, it would be unsafe to rely on that literal interpretation as a binding precedent. Again, the amount of the personal estate, for which the Executors were responsible, was not shewn when the decree in question was pronounced, nor does it now fully appear; the Executors having been in *default* in not returning an inventory; but it sufficiently appears, (especially as no inference very favourable to executors making the default last mentioned will be drawn,) that it was considerable. The Will speaks of various plantations, with stocks of horses, cattle and hogs thereon; and it gives to his wife one fourth part of his slaves during life. The mortgage

given by Philip Rootes one of the Executors to Richard Shackelford his security, to indemnify him, is for ten slaves, said to be those held the widow. Whether these were all that she held under the Will, is not stated; but, if they were, this would make the whole number of slaves about forty. This mortgage was ample to indemnify the security, had he not permitted that property also to be squandered. When these things now appear, shall it be said that innocent and *bona fide* purchasers of the real estate, (if even the original purchasers were now before the Court,) shall be held liable, after this great lapse of time, in exoneration of the securities of the Executors, who permitted their principals rapidly to dilapidate and waste a large real and personal estate; for it appears they both died insolvent, at an early day; and when, too, one of these sureties, (as it now appears,) took ample counter security for his indemnity, as is aforesaid.

According to these principles, the decree in question ought not to prejudice the purchasers under Philip and Thomas R. Rootes; and, although they have not appealed from the interlocutory decree in this case, yet these principles will equally apply to them when a final decree shall be pronounced.

The principles now established are, that all persons claiming any estate under Philip and Thomas R. Rootes the executors, or under John and George Rootes, for their proportional shares, (*except bona fide purchasers*, under them or either of them,) if any such can be found, should be, in the first place, liable to the demand of the appellant; and that the heirs, executors and legatees of the sureties of the said executors are liable in the next place, and ought to be called upon to contribute their proportional parts, so far as the estate, to them descended, devised, or otherwise come to their possession, may extend; the legatees and representatives of Richard Shackelford being alone chargeable with the amount of the value of the slaves, or other effects, which he or they received from the said Executors, or either of them, towards indemnifying him on account of his surety ship, and which has not been applied, in satisfaction of the

JANUARY,
1818.

Lewis and
others
v.
Thornton
and Wife.

JANUARY,
1818.

Lewis and
others
v.
Thornton &
Wife.

legacy in question, or any other demand to which he was subject as surety aforesaid.

As to the lands of the appellants, the Court is of opinion, that they ought not to be now charged, after the great lapse of time which has taken place; because it might admit of a doubt whether the charge was so much upon the *land* itself, by the terms of the Will, as upon the *profits* thereof;(1) because those lands might be presumed to be intended to be exonerated, by the requisition of security in the codicil; and because, above all, the testator is shewn to have left an abundant personal estate to satisfy the legacies. It is greatly to be regretted that, so much delay and expense should have taken place, in consequence of the former decree of this Court, and, especially, as it regards the appellees, who were satisfied with the decree formerly appealed from; but this hardship can not justify a decree against persons not liable; any more than, in ordinary cases, where parties are directed to be made, against whom a decree may finally be found improper or unnecessary. Courts of Chancery lessen this evil in some degree, by refusing to give *costs*, against complainants, to parties made by their direction, and by throwing the general expenses of such enquiries on the parties at whose instance, or for whose benefit, such enquiries and costs were instituted and incurred;—which the Court thinks ought to be done in this case.

The Decree is therefore reversed with costs, and the cause remanded, to be farther proceeded in according to the principles above declared.

(1) Note. The words of the Will were, “which money must be raised out of my whole estate, after the debts due to me are got in, and the lands and other things, above directed to be sold, are applied to that purpose; and ‘tis my desire that, after my wife’s, my son Philip’s and my son Thomas Reid’s parts are taken out, the rest of my estate be kept together until the first of December after my son John shall arrive to lawful age, and then his part to be delivered to him; and when my son George comes to lawful age, I desire his part may be delivered to him; and, if any money remain after my debts and legacies are paid, I desire it may be equally divided between my four daughters. The Codicil directed “that the stock of hogs, cattle &c. on his plantations in New Kent, and also his three lots in Fredericksburg, be sold for the payment of his debts and legacies.”

Beverleys against Miller.

Decided,
Feb. 4
1818.

ROBERT G. BEVERLEY, having greatly wasted his estate, in the year 1788 conveyed the remains of it, (which were still valuable,) to his father in law *William Buckner*, and his near relations *William Miller* and *Robert B. Chew*, in trust;—1st, to apply the profits, or principal if necessary, towards the suitable, decent and proper support of himself, his wife and children, &c.; 2dly. To apply the profits, or principal if necessary, to the payment of all his just and legal debts; and 3dly. the surplus to the use of such persons as he should bequeath or devise it to, or to his representatives in case of intestacy.—The trustees accepted the trust, and in a short time disposed of the whole estate, except a small tract of poor land, which rented for \$50, and a lot in the town of Port Royal. Mrs. *Beverley* not having relinquished her dower in a valuable estate called *Hazlewood*, and an estate sold by her husband; and the trustees being, (as was alledged,) unable to make a beneficial sale of the said estate, without the relinquishment of her dower interest, entered into a contract with her, and certain trustees on her behalf, by which they agreed, in consideration of her releasing her said dower, to retain the sum of 1333*l.* 6*s.* 8*d.* out of the purchase money of said estate called *Hazlewood*, invest it in property, and convey the proceeds to her trustees, for the support and maintenance of herself and husband, and their children, and the education of the children, and at the death of herself and husband to divide it among their children.

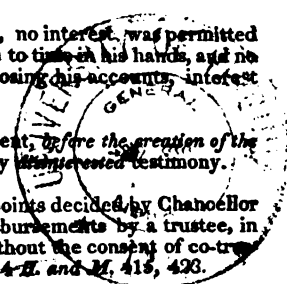
pointed, notwithstanding all the testimony and accounts were taken before his death.

2. Under the particular circumstances of this case, no interest was permitted to be charged against a trustee on the monies from time to time in his hands, and no commissions were allowed him for his trouble; but on closing his accounts, interest was allowed on a balance in his favour.

3. A charge by a trustee, for articles sold, and cash lent, before the creation of the trust, ought not to be allowed, without proof thereof by *unimpeached* testimony.

4. It appears, from the decree in this case, that the points decided by Chancellor *TAYLOR*, concerning the evidence requisite to prove disbursements by a trustee, in execution of the trust, and as to disbursements made without the consent of co-trustees, were affirmed by the Court of Appeals. *See 4 H. and M. 415, 423.*

1. If a suit against an infant in the Superior Court of Chancery, be fully defended by his guardian appointed by the county court, whose answer is received on his behalf, under the sanction and authority of the Superior Court; he must be equally bound by such defence, as if such guardian had been, in form, appointed guardian *ad litem*: but if the suit abate as to such guardian, by his death, before the decree; a guardian *ad litem* ought to be ap-



FEBRUARY
1818.

Beverleys
v.
Miller.

All the trustees for a time acted; but *Miller and Chew*, principally, until the death of *Chew*, which happened in 1791; and thenceforward *Miller* had almost the whole management.

In the year 1797, *Beverley* died, having made a Will by which he devised the remains of the trust estate to be sold, and the money divided among his children, and desired that the accounts with his trustees should be speedily settled; and what was due from them, he bequeathed to his children. This will was admitted to probate; but no executor qualified, nor did any person take administration of his estate.

The accounts of the trustees remaining unsettled, the widow *Elizabeth L. Beverley*, in Jan. 1803, on behalf of herself, and as guardian, mother and next friend of the said children, exhibited her bill, before the County Court of Caroline, against *Miller*, for a settlement of his account as surviving and principally acting trustee; stating the creation of the trust; alledging that the defendant had received large sums of money on that account; and that he, being a merchant, had mingled the same with the funds belonging to the mercantile companies of which he was a partner, and used them indiscriminately. *Miller's* answer to this Bill, averred his readiness at all times to settle his accounts, and admitted that probably the money belonging to the trust might have been so mingled and used; but, if it was, it was without prejudice to the trust estate.

In the same month and year, he exhibited a bill before the Superior Court of Chancery for the Richmond District, against *Elizabeth L. Beverley*, as widow, and executrix in her own wrong, and the children of the said *Robert G. Beverley*, (who were infants,) stating, in substance the foregoing facts respecting the creation of the trust, together with many details of the manner in which it had been executed; claiming a large balance to be due him, independent of an allowance for his trouble; stating the death of *Robert G. Beverley*; that no person had administered; but that his widow had taken possession of his whole real and personal estate; and praying that his ac-

count as trustee might be settled; that the tract and lot of land, remaining of the trust subject, might be sold to pay such balance as might be found due him; and for general relief.

FEBRUARY,
1818.

Beverley
v.
Miller.

No guardian *ad litem* was appointed for the infant defendants; but, in December 1803, an answer was filed by *Elizabeth L. Beverley*, purporting to be, for herself, and as guardian of her infant children. This Answer stated, that the deed of trust was executed by her husband in consequence of the *impertunity* of his relations, and, among them, of the trustees, who *professed to undertake the trust from motives of friendship only*; that, if commissions had been hinted at, her husband would not have created the trust; that the remnant of the subject was of small value, much less than the claim of the plaintiff; that, if the said claim prevailed, the trust, instead of saving any thing for the *cestuy que trust* and his family, would bereave *them* of the whole of his property, and only operate for the benefit of the trustees; that the trust had been greatly mismanaged; that the remaining land had been rented by the plaintiff, for ten years, to *Thomas Miller* his brother, for the small sum of \$50 per annum; that the plaintiff had derived great advantages from the trust, having absorbed the money he received from it by debts which he paid off in goods from his store, and in goods at high prices sold to the *cestuy que trust*. She insisted that he ought not to be allowed *commissions*, especially on the 133*l* 6*s*. 8*d*., the money that came to her, and was invested by *her trustees*. She denied that she had any assets of her husband's estate; stating that he left but a few moveables, which were taken, after his death, by executions issued in his life time; that she never received any profits of the estate of her deceased husband, except the sum of 52*l*. 4*s*. 6*d*., for rent, from *Thomas Miller*; that she never possessed the tract of land that remained unsold; &c. To this answer, there was a general replication.

The suit instituted by *Elizabeth L. Beverley*, as aforesaid, in the County Court of Caroline, was, on *Miller's* application, removed by *certiorari* to the Superior Court

FEBRUARY,
1818.

Beverley
v
Miller.

of Chancery; after which, the accounts, between the parties in both suits, were referred to a Commissioner, who reported a balance, in favour of the trustees, of 46*l.* 16*s.* 11½*d.*; having rejected claims on his part, to the amount of 199*l.* 3*s.* 2½*d.*, as not sufficiently supported by evidence; excluded from the account a charge of commissions; and refused to credit the trust estate for interest on the sums that, from time to time, had been in his hands.

Upon exceptions taken to this report, Chancellor TAX-
LOR pronounced the opinion and decree, in 4 *H. & M.* 415-423; whereupon, the Commissioner reported another Account, in which he incorporated the charge of commissions and the credit for interest, and allowed to the trustee credits, for sundry items, being part of the sum of 199*l.* 3*s.* 2½*d.* before rejected.

The suits, having abated by the death of *William Miller*, were revived in the name of *Thomas Miller* his executor.

The Chancellor, (being of opinion that the Commissioner had not correctly understood his directions respecting the manner and nature of the proof to support the claims for certain disbursements alledged by the trustee,) recommitted the report, to be reformed according to those principles. Another Report was then made, by which all but one of the said disbursements (originally rejected,) were allowed, and, to each item, the proof in support of it was annexed, together with the principle on which it was admitted. To this Report, exceptions were filed; alledging that many items (particularly scheduled,) had been admitted, though not embraced by the principles laid down for his guidance by the decree, and unsupported by any satisfactory proof. These exceptions were disallowed by the Chancellor; the report was confirmed, and an order made, directing a Commissioner to state and report an account of the trust estate undisposed of, and in whose possession it was; and whether *Robert G. Beverley* left any other estate, and in whose possession it was. In execution of this order, the Commissioner reported, that the remaining trust subject was the lot and

land aforesaid; that it was in the possession of *Elizabeth L. Beverley*; that the land had been occupied fifteen years by *Thomas Miller* (the present plaintiff,) under a lease from *Robert G. Beverley* in his life time, at the rent of \$50 per annum; that *Mrs. Beverley* had received, for rents of the land since the termination of *Miller's* lease, \$226 66; that it did not appear that *Thomas Miller* had paid the rents due on his lease; that the lot had been rented out by *Mrs. Beverley*, and the rents amounted to about \$540, part of which she had received. To this Report the *Beverleys* excepted; because the rents due on *Thomas Miller's* lease were not credited against the balance claimed, under former Reports, to be due to him as executor of *William Miller*; they insisting, that this credit should be allowed, unless it were shewn that the rents had been paid by him; so that the devisees of *Beverley* might have a credit for them, against the trustee, if paid to him, or a claim against the widow, if paid to her.

FEBRUARY,
1818.

Beverleys
v.
Miller.

Mrs. Beverley having died, the suit abated as to her. The causes, being transferred to the Superior Court of Chancery for the Fredericksburg District, were again heard; and Chancellor NELSON, overruling the exceptions to the last report, decreed that, unless the devisees of *Robert G. Beverley*, or one of them, should, within a given time, pay to *Miller's* executor the sum of 549*l.* with interest on 339*l.* 12*s.* 3*d.*, part thereof, from the 1st of January 1810, 'till payment, and the costs of the first suit, certain Commissioners should sell, on a credit of six months, the lot and tract of land aforesaid, or so much thereof as might be necessary to pay the said sum, interest, and costs, &c.

From this decree, *William, Henry and Maria Beverleys*, the surviving defendants, appealed.

February 4th, 1818, Judge ROANE pronounced this Courts' Opinion.

The Court is of opinion, that, as *Elizabeth L. Beverley*, who defended this suit for her infant children, had been appointed their guardian by the County Court;(1) and as her answer was received for them, and full defence made, under the sanction and authority of the Chancery Court,

FEBRUARY,
1818.

Beverleys
v.
Miller.

although she was not expressly appointed Guardian to defend that suit; they must be equally bound by that defence as if she had been in form appointed by the Court guardian *ad litem*. But, as the suit had abated as to her, by her death, before the Decree, and altho' all the testimony and accounts were taken before her death, yet a guardian *ad litem* ought to have been appointed before the decree was pronounced.

The Court is also of opinion, that the decree in this case is further erroneous, in this; that, under it's particular circumstances, no interest ought to be allowed on the one hand, or commissions on the other, except interest on the balance found due to the trustee; and that the charge of 18*l.* 12*s.* 8*d.* for sundry articles sold and cash lent, from 1784 to 1787, with interest thereon, being before the creation of the trust, ought not to have been allowed by the Commissioner without proof thereof by *disinterested* testimony. The Court is also of opinion, that the rents of the real estate belonging to the trust fund, unless the same were paid to Robert G. Beverley in his life time, or his widow after his death, for their maintainance and the education of the children, ought either to have been collected by the trustee William Miller, and credit therefor given; or that fund, if not heretofore paid, by the Tenant or Tenants as aforesaid, either to the *cestuy que trusts*, or Trustee, ought now to be resorted to and applied, in the first place, to discharge the balance due the Trustee; in exoneration of the Land.

The Decree therefore, so far as it conflicts with this opinion, is reversed, with costs, and the residue thereof affirmed; and the cause is remanded to the Chancery Court to be finally proceeded in according to the principles above declared.

(1) Note. This fact appeared by an Exhibit in the record.

Jones against Doe, Lessee of Carter.

Decided,
Feb. 5th,
1818.

A Judgment in Ejectment for three hundred acres of land, having been obtained against *Henry Jones* in his life time, a *scire facias* was issued after his death, to revive it, against *Henry Jones, Zachariah Jones, George Smith,* and *Mildred* his wife, heirs and devisees of the deceased; which writ was executed on *Henry Jones* only, the other defendants being returned, "no inhabitants of this Commonwealth." Whereupon the defendant *Henry Jones*, by his attorney, said, "that he could not gainsay the plaintiff's right to revive the judgment in the *scire facias* aforesaid mentioned;" and judgment was entered, "that the plaintiff recover and have execution against the said defendant, for his term yet to come, of and in one tenement, messuage and tract of land, containing three hundred acres, lying and being &c.:" from which judgment, the said *Henry Jones* appealed.

Upon a *scire facias* against heirs and devisees, to revive a judgment in ejectment, if one of the defendants confess the plaintiff's right to revive the judgment in the *scire facias* mentioned; and thereupon judgment be entered against him, that the plaintiff have execution for the whole tract of land in question; there is no error in such judgment, of which he can take advantage.

The following was the opinion of this Court, pronounced by Judge ROANE.

The appellant in this case having admitted that he could not gainsay the appellee's right to revive the judgment mentioned in the *scire facias*, the Court is of opinion that there is no error in the said judgment;—at least, of which he can complain. Nor would the case be different, could we restrict the acknowledgment to apply to his own portion of the land merely. In that case, the judgment, so far as it exceeded that portion, would not be injurious to him, nor could he complain of it.

Judgment affirmed.

Decided,
Feb. 6, 1818.

Arnolds against Jacksons.

1. If, after *James and George Arnolds* brought an action of debt, great delay in the County Court of Harrison, on a *joint* single bill, in executing an order of reference dated April 19th 1796, against *Edward and John Jacksons*; to which they pleaded payment. The suit was made *pendente lite*, the Court set it aside, on motion of one of the parties, without any previous notice or rule to shew cause: but it did not appear, by a bill of exceptions, or otherwise, that any step had been taken to carry such order of reference into effect; after which, a fair trial is had, and judgment entered accordingly; such judgment ought to be affirmed.

2. In debt on a *joint* obligation, to which the defendants plead payment, they cannot give in evidence a Covenant between one of the plaintiffs and one of the defendants, with perol testimony that the plaintiffs settled with that defendant, who was the *principal* debtor, and in such settlement kept their accounts separately, and that each was entitled to one moiety of the debt; that the defendants gave notice that a discount would be claimed by them on account of said covenant; and that the plaintiff who was party to the covenant, said that the same was not settled, and that he intended to allow a credit for it.

FEBRUARY,
1818.

Arnolds
v.
Jacksons.

A verdict and Judgment being rendered for the plaintiffs, a Writ of *Superseas* was granted by a Judge of the General Court, and the judgment reversed, on the ground that "the County Court erred in setting aside the rule of reference, without notice to the defendants and good cause shewn." Judgment was therefore entered, that the order setting aside the said rule of reference, be set aside, together with all the subsequent proceedings, and the cause remanded, for farther proceedings to be had thereon.

To this Judgment, the plaintiffs obtained a *Superseas* from this Court; 1st, because the evidence offered by the defendants, as stated in their bill of exceptions, was properly rejected by the County Court; 2d., because the County Court did right in setting aside the order of reference; as the delay to execute it was a sufficient reason, and there was nothing stated in the record to shew that the Court erred; for no bill of exceptions was taken to their opinion in that respect; and 3d., because the motion to the Court, at the subsequent term, to set aside the rescinding order, did not shew that the referee had acted, or offered to act, or that the defendants had applied to him to act, or taken any steps to procure a decision of the cause:—besides, no bill of exceptions was taken to the Court's opinion over ruling that motion, so as to shew that they erred in so doing; and, as nothing was shewn to the contrary, it was to be presumed that they acted rightly.

BY THIS COURT, the Judgment of the Superior Court was reversed, and that of the County Court affirmed.

Decided,
Feb. 9th,
1818.

Allen against Bird and others.

1. Under circumstances, a legacy, bequeathed in Sept. 1779, to the testator's daughters, was not reduced by the scale of depreciation, but directed to be paid in *specie*; the words "*current money*," being omitted in the Will, and it appearing presumable, from acts of the testator nearly contemporaneous, and from the great value of the lands devised to his sons, by whom he directed the legacy to be paid, that he meant *specie*.

REUBEN ALLEN sen., of Shenandoah County, on the 1st of September 1779, made his last Will, (admitted to probate in November following,) by which he bequeathed to his daughters, *Hannah* who afterwards married *George Bird*, and *Mary* who afterwards married *Bonjamin Hawkins*, 1000*l.* each, without adding the word "*specie*," or the words "*current money*;" one third part thereof to be paid by each of his sons, *Thomas*, *Aaron* and *John*, upon their respectively attaining the age of twenty one years; of whom *Thomas* died, shortly after the testator, under age and unmarried. The testator devised to his said sons all his lands (which, at the date of the Will and afterwards, were very valuable,) and three fourths of his personal estate; and died unincumbered with debt. The Will directed farther, that, in case his son *Thomas Allen* should die before he arrived at the age of 21 years, or married, or, if married, should die without heir, then the estate bequeathed to him should be equally divided between his sons *Aaron* and *John Allen*, they or his executors paying his daughters' proportion of his estate bequeathed them, at such time as tho' he the said *Thomas Allen* had lived to the age of twenty one years.

Upon this Will, the surviving sons *Aaron* and *John* contended, that the legacies to the daughters should be reduced by the scale of depreciation: the daughters' husband insisted that it was the testator's intention to give them each 1000*l.* in *specie*.

A suit in the Superior Court of Chancery was therefore brought, in their behalf, against *Aaron Allen* and *John Allen*, sons, heirs and devisees, and *Joseph Moore* administrator of *Richard Moore* who was executor of the deceased.

The other circumstances of the case, considered important by this Court, are set forth in its opinion.

Chancellor BROWN had "some doubt as to the real intention of the testator; yet, upon consideration of all the evidence, and all the circumstances, was of opinion, " that his intention would be *most probably* carried into

FEBRUARY.
1818.

Allen
v.
Bird and
others.

“ effect by adopting that interpretation of his Will which
“ appeared most just, and by decreeing the legacies in
“ the currency of the present day. He would have de-
“ creed the appropriation, towards this object, of the
“ monies which appeared to be in the hands of the Exec-
“ utor; but that it was thought most proper to leave that
“ matter to the County Court, where a suit was pending
“ against the executor, and where justice could be done
“ between him and the other defendants in this cause.”

The suit appearing to have been compromised between the plaintiffs and the defendant *John Allen*, the decree therefore was, that the defendant *Aaron Allen* do pay to the plaintiffs *Hawkins* and wife the sum of 500*l.*, with 5 per cent. interest on 160*l.* 13*s.* 4*d.* part thereof, from the 1st of October 1793, until paid, and with like interest on the residue thereof from the 1st of October 1795, until paid; (the aforesaid several periods being the dates at which it appeared that *Thomas* and *Aaron Allen* would have attained their respective ages of 21 years, if they had both lived;) that he do pay to the plaintiffs *Bird* and wife the like sum of 500*l.* with like interest from the dates aforesaid; and that he pay the costs of this suit. It was farther decreed that, if the said defendant should fail to make the said payment on or before a given day, certain persons named as Commissioners should, after advertising &c., sell the land devised by the testator as aforesaid to the said *Aaron Allen*, or so much thereof as would be necessary, to satisfy this decree, &c. The Bill was dismissed as against the defendants *Joseph Moore* and *John Allen*, but without costs.

From this decree, an appeal was taken.

February 9th, 1818, Judge ROANE pronounced the following opinion of this Court.

The Court is of opinion that, as the testator is proved to have valued his land, and perhaps offered it for sale, not very long before his death, for about the sum of 3000*l.* which, if reduced by the scale as of October 1779, (the probable time of his death,) was only equal to a little upwards of 100*l.* in specie; and as the land is admitted on all hands to have been extremely valuable; he could not, in making such offer and valuation, have meant the paper

FEBRUARY,
1818.

Allen
v.
Bird and
others.

money of the day: nor is it presumable that he meant it in his Will, which was nearly a cotemporaneous act.— This construction is fortified by the omission to use the term “current money,” in giving the legacies in question; and by his having kept his accounts in specie, and received notes in the same currency, as appears from a list reported by the Commissioner.

On these grounds, added to the extremely reduced sum, which the legacies, if scaled, would yield to his daughters, who it is not shewn had ever displeased him, and which were also postponed to very distant days, we are induced to think he could not have meant the paper currency at the time of the devise in question.— Had he meant that currency, he might easily have caused it to be paid at once, by selling a small portion of his personal property.

The Decree is therefore to be affirmed.

~~SHAFER~~

Decided,
Feb. 9, 1818.

Shaver against White and Dougherty.

1. Actions may be bro't in the Courts of this State, upon contracts entered into, or personal injuries committed, any where.

THE circumstances of this case, and points in controversy between the parties, together with the Court's opinion thereupon, were stated as follows, by Judge ROANE.

In general, it is not necessary to state, in the declaration, where the contract arose, or the injury was committed:—but this is sometimes necessary; and, then, for the sake of obviating the objection of a variance, or the like, the plaintiff is permitted to state, by a fiction, under a *videlicet*, that the place is within the jurisdiction of the Court in which the suit is brought; which fiction, being in furtherance of justice, cannot be traversed.

2. In cases, in which the plaintiff does not use this fiction, the defendant is not, in general, permitted to aver that the cause of action arose in another Country, unless he wishes to justify the act by the laws of that Country; or to shew, thereby, that he is not responsible in the particular form of action in question; in which cases, the locality of the act forms an essential part of his defence:—but such plea does not go to the *jurisdiction* of the Court, but only to the *justification* of the defendant.

3. It is a principle, that, if a party be justified, as to a transaction, in the Country or place in which it is committed, he is justifiable every where.

4. Case for malicious prosecution, and not trespass *vi et armis*, is the proper action against a person who, maliciously and without probable cause, sues out an attachment, and causes it be levied on the property of another.

This was an action of Trespass, brought by the appellee, *White and Dougherty*, against the appellant, in the Superior Court of law for the County of Washington.— It charges that he (the appellant) combined with — *Fagon*, at Sullivan, to wit at the County of Washington aforesaid, and within the jurisdiction of the Court, with force and arms, took three hundred head of cattle out of their possession, and other wrongs then and there did, against the peace of the Commonwealth. To this Declaration four several pleas were put in, and were demurred to by the plaintiffs, which demurrer was held good by the Court; whereupon, the defendant pleaded *not guilty*, on which, issue was taken; and a verdict was found for the plaintiffs, subject to the opinion of the Court upon the demurrer to evidence. The Court gave judgment for the plaintiff upon the demurrer, from which the defendant appealed to this Court.

FEBRUARY,
1818.

Shaver
v.
White and
Dougherty.

As all the objections taken in the case, equally occur upon the Demurrer to Evidence, as upon the pleas, it will not be necessary for us to go into the latter; farther, at least, than is inferrable from the opinion given upon the former. It is probable, however, that judgment should have been rendered for the appellant, at an earlier stage, upon the two last pleas; on the ground that they set forth facts which shew, that *Case*, and not *Trespass*, was the proper action.

The Case, as briefly collected from the demurrer to evidence, is, that the appellant had obtained an attachment, in Tennessee, for a debt claimed as due from *White*, and caused it to be levied upon the property of both the plaintiffs; which attachment, it is *alleged*, was obtained on false pretences, and was iniquitous. The Judgment rendered on the Attachment was also perpetually enjoined by the Court of Errors in that State. In addition to this objection to the proceeding, it is further objected that

5. It seems, that, upon an attachment for a debt claimed as due from one partner, the Sheriff must seize *all* the partnership effects, and sell a *moiety thereof undivided*; in which case, the Vendee will be tenant in common with the other partner—for, if he seized but a *moiety*, and sold *that*, the other partner would have a right to a *moiety* of such *moiety*.

February,
1818.

Shaver
v.
White and
Dougherty.

the action did not lie in Virginia, for an act committed in Tennessee; and that trespass was not the proper action.

We hold it to be a clear principle, that actions may be brought here upon contracts entered into, or personal injuries committed, any where. In general, it is not necessary to state in the declaration, *where* the contract arose, or the injury was committed. But this is sometimes necessary, and then (for the sake of obviating the objection of a variance, or the like,) the plaintiff is permitted, by a fiction, to state, under a *videlicet*, that the place is within the jurisdiction of the Court in which the suit is brought. It is also held that this fiction, being in furtherance of justice, can not be traversed. In cases in which the plaintiff does not use this fiction, the defendant shall not, in general, be permitted to aver that the cause of action arose in another Country; for that averment is in conflict with the principle before stated, that contracts and personal injuries are not in their nature *local*. A defendant shall not be permitted to aver this fact, unless he finds it necessary to aver, also, that, by the laws of the Country in which the act was committed, it was justifiable. In that case the locality of the act forms an essential part of his defence; it cuts up the right of action of the plaintiff; and the pleading it is even beneficial to the plaintiff, as it affords him an opportunity, before the trial, of ascertaining whether the laws of the Country in question are such as are averred by the plea.

In the case before us, it was not improper for the defendant to plead that the trespass was committed in the State of Tennessee, as he also pleaded that he was acting under the authority of the laws of that State, in the instance in question. These facts, however, do not go to the jurisdiction of the Court; but only to the justification of the defendant; the principle being, as aforesaid, that if a party is justified, as to a transaction, in the Country or place in which it was committed, he is justifiable every where.

So, these facts may not only amount to a complete justification of the defendant; but, if they do not, they may

show he is not responsible in the particular form of action in question. They shew, in the case before us, that the action of trespass *vi et armis* does not lie. The act in question was unaccompanied with force, and the defendant was only seeking redress of an injury by the regular forms of law. If, indeed, he has gone out of his proper province, and has endeavoured to make those forms subservient to the malignity of his views; if he has instituted the action or proceeding with malice and without probable cause; then, indeed, he is responsible for his conduct; but not in this form of action. The action adapted to such a state of things, is a special action on the case, for a malicious prosecution. The case of *Young v. Gregory*, in this Court, is conclusive to shew both that that is the proper kind of action, and that the declaration should aver the existence of malice, and the want of a probable cause of action.

FEBRUARY,
1818.

Shaver

v.

White and
Dougherty.

The Evidence disclosed in the Demurrer, therefore, does not authorize the appellees to recover in *this* action, which is an action of Trespass. Whether it would justify a judgment in an action for a malicious prosecution, we need not determine.

This view of the case is conclusive as to the appellee *White*. It is also conclusive as to *Dougherty*. By connecting himself with *White* in this action, and suing the appellant instead of the Sheriff, he must submit to the decision in it. He can not bring an action of *trespass* against the appellant, who has only pursued a legal remedy; and it is not necessary for us to say whether he could bring that action against the Sheriff, who is no party to this action. As at present advised, however, we think the officer was justified in seizing *all* the partnership effects. It is laid down in the case of *Heydon v. Heydon*, 1 *Salk.* 392, that, on a judgment against one co-partner, the Sheriff must seize all the partnership effects; because the moieties are undivided; for if he seize but a moiety, and sell that, the other partner will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the Vendee will be tenant in common with the other partner.

On these grounds, we are of opinion, that the judgment should be reversed, and entered for the appellant.

Decided,
Feb. 10th,
1818.

Lynch and wife against Hill and wife.

1. In supplying words in a Will, it is the most correct course to supply such only as it is evident the testator intended to use, and not such, also, as would be necessary to effectuate the supposed intention of the testator.

Armistead Hill and *Sally* his wife filed a bill in the Superior Court of Chancery for the Richmond district against *Francis Lynch* and *Sally* his wife, who, at the same time, filed their answer, to which the plaintiffs replied generally; which bill and answer, with the exhibits, were by consent presented to the said Court, for its opinion and decree thereupon.

The question between the parties, depended upon the construction of the following clause in the codicil to the Will of *John Cogbill*, established by the judgment of this Court in May 1808; (reported in 2 *H. and M.* 467, 525;) a full copy of which codicil is inserted in page 472—3 of the same book. “But, in case *Sally Nelson Cogbill*, with-

2. Wherefore, the words of a contingent limitation being, “in case *S. N. C.* without issues of body lawfully begotten, then, then,” &c. the words “die,” and “her,” may be supplied, as evidently intended by the testator; but not the word “leaving,” which he might not have known to be necessary in law to give the limitation effect, and therefore might not have intended to use.

“out issues of body lawfully begotten, then and in that case I give and bequeath the whole estate, given to *Sally N. Cogbill*, to be equally divided between *Sally Cogbill* her mother and my niece *Sally Hill*, daughter of my brother *Jesse Cogbill* deceased, to them and their heirs and assigns forever.” It was contended on the part of the plaintiffs, that *Sally Cogbill*, widow of *Thomas N. Cogbill*, and first legatee in the codicil, having married the defendant *Francis Lynch*, her particular interest in the personal estate, which was bequeathed to her only so long as she remained *T. N. Cogbill*’s widow, ceased and determined, and the remainder given to *Sally N. Cogbill* took effect; that the limitation over, on the death of the said *Sally N. Cogbill* without issue, &c.,

3. Certain real and personal estate being devised to *S. N. C.*, “her heirs and assigns forever; but, in case she should die without issue of her body lawfully begotten, then and in that case, to be equally divided between *S. C.* and *S. H.* to them and their heirs and assigns forever;” this limitation over was too remote, and could not take effect.

to her mother *Sally Cogbill* and the plaintiff *Sally Hill*, was a good executory bequest, and therefore that the plaintiffs were entitled to one moiety of the said personal estate, and of the profits thereof which had accrued since the marriage of the said *Sally Cogbill* with *Francis Lynch*. The defendants insisted, that the said limitation over was too remote, and therefore void; and that *Sally N. Cogbill*, by the bequest to her, took an absolute estate, to which the said *Sally Lynch*, her mother, became lawfully entitled upon her dying an infant, unmarried and childless.

FEBRUARY,
1818.

Lynch and
Wife
v.
Hill & Wife.

Chancellor TAYLOR was of opinion, that, "the contingency being so expressed by the testator, as to manifest that some word, or words, were inadvertently omitted by him, which he clearly intended, the Court must intend some word, or words, to complete the sense of that passage; and, in so doing, this Court will intend such words as will give effect to the manifest intention of the testator and the executory bequest, rather than such as will defeat such his intention and bequest. This Court, then, reads that passage of the Codicil, thus; "in case *Sally Nelson Cogbill* die without leaving issues of her body lawfully begotten, then &c.:" which intendment being admitted, the Court is of opinion that the said executory bequest "is good and valid." The decree therefore was, that the slaves and their increase be equally divided between the parties; that the defendants render an account of the profits of the said slaves accruing between the date of their intermarriage and the date of such division, and also an account of the other personal estate bequeathed by the said Codicil, before a Commissioner of the Court; &c.

From this decree, the defendants appealed.

The following was the opinion of the Court of Appeals.

The Court is of opinion, that, in supplying words in a testament or last Will, it is the most correct course to supply such only as it is evident the testator intended to use, and not such, also, as would be necessary to effectuate the supposed intention of the testator. Acting on this principle, the Court dissents from the decree of the Chancellor, so far as it supplies the word "leaving," in the clause in question.

The result of this opinion is, that the decree is to be reversed with Costs, and the bill dismissed.

Decided,
Feb. 17th,
1818.

Attorney General against Broaddus and Wife.

1. A prosecution under the 13th section of the Act of 1792, concerning incestuous marriages, was a criminal prosecution; and therefore, it seems, the direction therein, that such prosecution should be instituted in the High Court of Chancery, was unconstitutional. (1)

IN this case, a petition was presented to this Court by *Philip Norborne Nicholas* Attorney General of the Commonwealth, on behalf of said Commonwealth, to be allowed an appeal from a decree of the Superior Court of Chancery for the Richmond District, dismissing a bill exhibited by the Petitioner against *Andrew Broaddus* and *Jane C. Broaddus*, in conformity with the 13th section of the Act of 1792, concerning incestuous marriages; edition of 1794, 1803 and 1814, p. 195. The Bill charged the Defendants with having unlawfully intermarried; the said *Jane C.* being a sister of the said *Andrew's* former wife; and prayed the Court of Chancery to decree the nullity of the said marriage, and make such farther decree in the premises, as the Act of Assembly required, and as a regard for the laws and public morals might demand and justify.

The defendants put in a plea denying the constitutionality of the said Act of Assembly; because the same was contrary to the 8th section of the Bill of Rights, being a *penal* statute, and the information or bill exhibited under it by the Attorney General being a *criminal* prosecution.

On these grounds, Chancellor *Taylor* dismissed the Bill.

The Court of Appeals, considering the decree as involving a constitutional question, granted the appeal, but, after argument by *Payton Randolph* and *Nicholas* for

(1) Note. The jurisdiction given by that section to the Court of Chancery, has since been transferred to the Superior Courts of law: see Acts of 1817, c. 18; B. Code of 1819, c. 106, § 17, 18, vol. 1st, p. 399.

the appellant, and *Leigh* for the appellees, dismissed it as improvidently awarded; this Court having no jurisdiction in criminal cases. (2) — See *Principles of Court*. Preface to this volume, p. iii.

(2) See *Bedinger v. the Commonwealth*, 3 Call, 461—475.

Scott and Wife and Claiborne against Loraine and others.

Decided,
Feb. 17th.
1818.

UPON an appeal granted by a Judge of this Court from an order of the Superior Court of Chancery for the Richmond District, dissolving an Injunction, which had been granted, upon a bill exhibited by *William Scott* and *Mary* his wife (formerly *Mary Davis*) and *Richard C. Claiborne* their trustee, to prevent the sales under executions against the Complainant *William Scott*, of certain property covered by a Deed of marriage settlement.

The said Deed bore date April 13th, 1809, was not attested by any subscribing Witness, but admitted to record, November, 20th 1809, upon the acknowledgment of all the parties in the County Court of Dinwiddie. Upon its face, it appeared to have been executed before the marriage; the consideration set forth being, that a marriage was shortly intended to be had and solemnized, &c.; the conveyance being of the property of *Mary Davis* the intended Wife, by herself, with the consent of the said *William Scott*; and her maiden name being signed thereto. The trusts were for the said *Mary* 'till the solemnization of the said intended marriage; and, then, that the trustee should permit the said *William Scott* and *Wife* during their joint lives, to have, receive, take and

1. Upon a bill of injunction, exhibited by husband and wife and their trustee, to prevent the husband's creditors from selling property covered by a deed of marriage settlement; the deed appearing, on its face, and by the oaths of all the Complainants, including the trustee, (who appeared to have no interest except as a party to the suit,) to have been executed before the marriage; and it not

being charged in the answers, or any of them, that the said deed was in fact antedated, though not attested by any subscribing witness, but admitted to record upon acknowledgments of the parties only; and though the defendants, in their answers, averred, that the said acknowledgments took place after the marriage; the Court could not with propriety dissolve the Injunction on the ground that the said Deed was antedated.

2. It seems, that property conveyed, by deed of marriage settlement, in trust, that the husband and wife shall be permitted, during their joint lives, to enjoy the profits, may be taken in execution to satisfy a debt, incurred after the marriage, for supplies furnished for the proper support of the husband and wife.

FEBRUARY,
1818.

~~~~~  
Scott and  
Wife and  
Chaiborne  
v.

Lorraine and  
others.

enjoy all the *interest and profits* of the said property, to and for their own use and benefit, &c.

The bill of Injunction, sworn to by the *trustee* as well as by *Scott and wife*, stated that the Deed *was executed on the 13th of April 1809, shortly before the marriage, and duly proved and recorded*; that the only motive or reason which induced it, was that, the said *Scott* being at the time considerably embarrassed with debts, it was thought adviseable to secure to the said *Mary her own property*, and to protect it from seizure to satisfy his creditors.

The precise time when the marriage took place, was not stated in the Bill, nor in any part of the record: but the defendants, in their answers, generally, averred, that the *acknowledgment* of the Deed, by the parties, was *after the marriage*, and without any privy examination of the wife; that there was no *proof* that in fact it had been *executed before the marriage*, which allegation therefore they did not *admit* to be true; that the grossest frauds might in this way be practised on creditors by husband and wife; and therefore, under all the circumstances, the said Deed ought to be considered void as to creditors. Some of the defendants alledged, also, that their claims were founded on contracts with the said *William Scott, since the marriage*, for articles furnished for the suitable support of *himself and wife*. They contended, therefore, that the *property* conveyed by the Deed, was not protected against their claim. Others, in whose favour a *feri facias* had been levied on part of a crop of grain made since the marriage, insisted, that, if the deed were legal, it did not cover the *profits of the estate* against *any* creditors; the *profits* being expressly vested in the husband and wife, (and, of course, *by operation of law, in the husband alone,*) during the coverture; and, if this general position were incorrect, a Court of *Equity* would, at any rate, hold the *profits* bound to satisfy *their claim*, which was for goods sold and delivered to the said *Scott and wife*, for the use of themselves and their family, since the marriage.

No affidavits of witnesses were filed on either side; but, shortly after the coming in of the Answers, Chancellor TAYLOR dissolved the Injunction.

*David Robertson* for the appellants.

*John F. May* for the appellees.

Judge ROANE pronounced this Courts' opinion.

The Court (not meaning to establish a general principle that, in all cases, in which property is held under a deed recorded accompanied by possession, a fraud can be only charged regularly in a bill brought to set aside such deed,) is of opinion that as, in this case, the date of the Deed in question is sworn to be that of its execution by all the plaintiffs, including the trustee, who appears to have no interest except as a party to the suit, and it not being charged in the answers, or any of them, that the said Deed was in fact antedated, the Chancellor erred in dissolving the Injunction on the supposed ground that it was so antedated. The Court is therefore of opinion, that the Decree be reversed, and the injunction be re-instated; but that the same may be dissolved hereafter as to the value or amount of any supplies shewn to have been furnished for the proper support of the appellant Scott and his wife. This Decree, however, is without prejudice to any suit that may be hereafter brought by the defendants, or any of them, for the purpose of setting aside the Deed in question, on the ground aforesaid, or any other.

FEBRUARY,  
1818.

Scott and  
Wife and  
Claiborne

v.  
Locaine and  
others.

Decided,  
Feb. 18th,  
1818.

**Chew executor of Wormeley against Moffett  
and wife who was administratrix of Car-  
ter.**

1. In debt AN action of Debt was brought in the County Court on a bond, if of Middlesex, by *Anne B. Carter* administratrix with the defendant plead that the will annexed of *Charles B. Carter* deceased, who was assignee of *Carter Beverley*, against *Eleanor Wormeley*, *Ralph Wormeley* and *Warner L. Wormeley*, upon an obligation in the following words:—

“Whereas it appearing, by the Will of *Ralph Wormeley Esqr.* deceased, that his daughter *Jane* had not been provided for as had been promised to her at her marriage with *Carter Beverley Esq.*, and whereas the said *Ralph Wormeley* having uniformly promised that he would at his death bequeath to his daughter afore-said two thousand pounds, We the undersigned, from a full conviction of the equity his daughter *Jane* has in and to the sum of two thousand pounds intended to have been left her by her father, instead of the two thousand dollars mentioned in his Will, and from the mutual affection that ever existed between her father and herself, desirous as we are to perpetuate the same good understanding, and that there should exist every degree of harmony in the family of the said *Ralph Wormeley* towards her and her husband; solicitous too as we most ardently feel to repair the mistake that was made by *Ralph Wormeley Esq.* aforesaid in mentioning dollars instead of pounds to his daughter *Beverley*, do hereby mutually agree to adjust the same, and for the payment of which well and truly to be made, we *Eleanor Wormeley* mother of said *Jane*, and *Ralph Wormeley* and *Warner Lewis Wormeley* brothers of said *Jane*, do hereby bind ourselves jointly and separately, our joint and separate heirs, executors and administrators in the penal sum of twenty eight hundred pounds current money.”

2. Issue being joined on a plea that a bond was obtained by fraud, a Verdict, “for the defendant, because the Jury believe the bond was obtained by fraudulently means,” is sufficiently positive and certain.

“Whereas the condition of the above obligation is such, that, if the above bound *Eleanor Wormeley*, *Ralph Wormeley* and *Warner Lewis Wormeley*, shall well and

“truly pay or cause to be paid to the said *Carter Beverley*, his heirs, executors, administrators or assigns, the just and full sum of fourteen hundred pounds, exclusive of the two thousand dollars bequeathed by the said *R. Wormeley* as aforesaid, then the above obligation to be void, or else to remain in full force and virtue, dated this 7th day of February in the year of our Lord one thousand eight hundred and six. Signed, sealed &c.”

FEBRUARY,  
1818.

Chew executor of  
*Wormeley*  
v.  
*Moffett and*  
*Wife*, who  
was administratrix of  
*Carter*.

The declaration was in the usual form, in debt, on an assigned bond. The following plea was put in by the defendants.

“These defendants by their Attornies come into Court, and, by leave of the Court first had and obtained, defend the force and injury when &c., and, for plea in this behalf say, that the plaintiff ought not to have and maintain her action aforesaid upon the bond in the declaration mentioned, because they say that the said bond was obtained from these defendants upon misrepresentations and false suggestions made by the said *Carter Beverley*, and by various undue and unfeeling means, by which the feelings and minds of these defendants were operated upon; the consideration upon which the said bond was founded being excited and created by false suggestions, as per preamble in the said bond; these defendants having been induced to believe that *Ralph Wormeley* deceased had made a promise in his lifetime to the said *Carter Beverley* to make up his wife *Jane*’s fortune to 3000*l.*, which is untrue; and being also induced by the declarations and conduct of the said *Beverley* to believe that the testator *Ralph Wormeley* did in his Will make a mistake in setting down \$2000, when he intended 2000*l.*, as bequeathed to his other daughters, all which is found to be untrue; it now being discovered to these defendants that the said *Ralph Wormeley* not only intended to make his daughter *Jane* the wife of the said *Carter Beverley* equal to his other daughters, but did actually do so, by advancements in money, and negroes in his lifetime, which, together with the \$2000, make up her part to 2000*l.*, the sum

FEBRUARY,  
1818.

Chew execu-  
tor of  
Wormeley  
v.

Moffett and  
Wife who  
was adminis-  
tratrix of  
Carter.

" devised to his other daughters: and ~~this these defendants~~  
" are ready to verify, &c."

*Anne B. Carter*, the plaintiff, having married *William Moffett*, the suit was permitted, by consent of parties, to remain on the docket in the name of *William Moffett* and *Anne B.* his wife. " And the plaintiffs, in answer to the said plea by the said defendants pleaded, say that they ought not to be precluded from having and maintaining their action against them, because they say there was *no fraud* committed in manner and form as the said defendants in their said plea have alledged; and this they pray may be enquired of by the Country;" and " the defendants likewise."

Upon the issue thus joined, a trial was had; and the Verdict was, " We of the Jury find for the defendant, *because we believe the bond was obtained by fraudulent means.*"

The suit having abated as to the defendant *Warner L. Wormeley* by the Sheriff's return of "*no inhabitant*," and as to the defendant *Ralph Wormeley* by death, Judgment was entered in favour of *Eleanor Wormeley* according to the Verdict.

The plaintiffs applied for a Writ of *Supersedeas* to this Judgment on the following grounds; 1st, that " the plea and verdict thereon did not shew any bar to the action; because the defendant was estopped by her obligation to deny the truth of the facts recited in the obligation; and because, even if she were not estopped, yet the facts, alledged by the plea, and found by the Verdict of the Jury to be true, were no bar, since they went to shew a fraud in the *consideration* and not in the *execution* of the bond; and fraud in the *consideration* of a bond can not be pleaded in bar, since a bond is obligatory without consideration:"—2dly, " that therefore judgment should have been given for the plaintiffs *non obstante veredicto*; or, if not, that a repleader should have been awarded, the issue being immaterial:"—3dly, " that, if the issue was material, the finding of the Jury is insufficient, not being positive, but presumptive."

The Superior Court of law was of opinion, that " the judgment was erroneous in this, that the defendant's

“*Administratrix*,” (the defendant *Eleanor Wormeley* having died, and *John Chew*, her executor, having been made defendant to the Writ of *Supersedeas*,) “was permitted to plead and alledge that as false, in bar of the plaintiff’s action, which she had by her deed acknowledged to be true, and which she was therefore by law estopped to alledge; and, although the Jury by their verdict have found the plea to be true, the finding is not more available than if the same had been admitted by a defendant.” The judgment was therefore reversed with costs, the proceedings set aside subsequent to the declaration, and the cause sent back to the County Court for farther proceedings.

PERMANENT,  
1818.  
Chew executor of Wormeley v. Moffett and Wife who was administratrix of Carter.

From this judgment the defendant appealed.

*Green, Wickham and Stanard* for the Appellant.

*Leigh* for the Appellees.

Judge ROANE pronounced the Opinion of this Court.

The Court is of opinion that, the appellees having joined issue on the plea in question, instead of demurring thereto, the estoppel, now relied upon by them, (if one existed,) was thereby waived.

The Judgment of the Superior Court is therefore reversed, and that of the County Court affirmed.

## Wooden against Bartlett and others.

Decided,  
Feb. 20th:  
1818.

A writing purporting to be the nuncupative Will of *Chilton Wilson* deceased, was exhibited on the 3d day of July 1815, to the County Court of Richmond, for probate, by *Thomas Wooden*, and contested by *Isaac Bartlett* and others.

It was as follows: “On Monday evening the 16th day of January 1815, I *William Morris* was at Mr. *Chilton Wilson*’s, and he was sick, but perfectly in his

1. Proof by one witness, that, on a certain day, in the time of the last sickness of the deceased, and at his habitation, he said it was his wish that a certain

person should heir all his property; and, by a second witness, that, on another day, during the same sickness, and at the same place, he heard the deceased speak the same words, and was told by him to take notice of what he said, is not sufficient to establish a nuncupative Will, if the value of the personal property of the deceased exceed thirty dollars.

FERRISANT, 1818. " senses, but from his feelings thought that he was not  
 Weeden " long for this world; and he said that, if it was to  
 Bartlett and " ease God to take him, it was his wish that Thomas  
 others. " Weeden should heir all of his property, and move to  
 " it and keep it all together: he also said that he had  
 " rather his estate should be sunk in the sea than for  
 " William Wilson, or any of Elisha Bartlett's heirs  
 " ever to possess any of his estate, or Daniel Wilson's  
 " heirs either."

" On Sunday the 15th, I Jonathan Bowing heard him  
 " say the same words, and told me to take notice of what  
 " he said. He died on the 17th of January, and we  
 " William Morriss and Jonathan Bowing was the two  
 " last white people that ever spoke to him that we know  
 " of. William Morriss, Jonathan W. & Bowing."  
 " Richmond County, to wit: This day came before me  
 " a Justice of the Peace for the County aforesaid, the  
 " within subscribers William Morriss and Jonathan  
 " Bowing, and made oath to the truth of the within  
 " statement. Given under my hand this 17th day of  
 " February 1815. Carter Mitchell."

The County Court, " upon examination of the Wil-  
 " nesses, and the argument of the parties by their At-  
 " tornies being heard," " was of opinion that the said  
 " writing was the Will of the deceased, and ordered it  
 " to be established as such, the personal property of the  
 " said deceased amounting to more than thirty dollars."

Upon an appeal, the Superior Court reversed this  
 order, because it did not appear to the said Court that  
 the heirs of the said Wilson had been previously sum-  
 moned to shew cause against the probate of the said  
 Will.

A *Supersedeas* to the Judgment of reversal was grant-  
 ed; and the following was the opinion of this Court.

The Court, not deciding absolutely that the judgment  
 of the Superior Court, reversing that of the County  
 Court, is correct as to the reason therein alledged, is of  
 opinion that, upon the merits, the same is not erroneous;  
 the nuncupative Will not being duly proved, as such, by  
 two witnesses pursuant to the provisions of the Act of

Assembly in such case made and provided.(1) And, on this ground, the judgment of the said Superior Court is affirmed.

(1) Note. See Edition of 1794, 1803 and 1814, ch. 92 § 5; R. Code of 1819, c. 104. § 7, Vol. 1st. p. 377.

## Bennett against Hardaway Administrator of Jones.

Decided  
Feb. 21th,  
1818.

The point determined in this case is of great importance in relation to the practice; the question presented by the record, being, whether, after a verdict, and motion for a new trial overruled, *all the evidence given in to the Jury, or only the facts proved, should be stated in a bill of exceptions to the Court's opinion overruling such motion.*

1. If a motion for a new trial, on the ground that the verdict is contrary to evidence, be overruled, a bill of exceptions to the Court's opinion ought not to state *all the evidence* given in to the Jury, but only the *facts* appearing to the Court to have been proved.

The suit was detainue for sundry slaves, on behalf of *Hardaway* administrator of *Jones* against *Bennett*, in the Superior Court of Mecklenburg County. On the plea of *non detinet*, the Jury found a verdict for the plaintiff. The defendant immediately moved the Court for a new trial; the reason assigned for which was not expressly set forth in the record. The Judge took time to consider until the next day, and then overruled the motion; whereupon a bill of exceptions was signed and sealed, setting forth all the evidence said to have been adduced on the trial; among which was the parol testimony of many witnesses.

Judgment being entered according to the verdict, the defendant appealed.

The cause was twice argued, by *Bouldin* for the appellant and *May* for the appellee; in the first instance upon the merits chiefly; and, in the last, particularly upon questions (suggested by the Court,) whether the bill of exceptions was properly taken, and whether this Court could now, on the ground that the Verdict was contrary to evidence, grant a new trial.



FEBRUARY,  
1818.

Bennett

v.

Hardaway  
Administrator of Jones

The last argument took place (in the absence of the Reporter) in February 1818, before a Court consisting of all the Judges, except Judge FLEMING: but the point decided is fully discussed in the following opinions.

Judge COALTER. As to the general question, whether a Bill of exceptions properly lies to the opinion of a Court of law in granting or refusing a new trial upon the testimony, I have no doubt, as well on principle as on the uniform decisions and declarations of this Court; but that such an opinion may be reviewed by an appellate Court, on a Bill of exceptions, whenever the motion is founded on the allegation that the verdict is contrary to the *law*, arising on the *facts* appearing in evidence before the jury; and I incline to think that such opinion may in like manner be reviewed, where the application is made on the ground of the verdict being contrary to the *weight* of evidence; though, in this latter case, if the motion is overruled, there ought to be very strong grounds to induce an appellate Court to set aside such verdict, against the opinions of a Court and jury, who not only heard the witnesses depose, but saw the manner in which they gave their testimony.

As to the manner in which such bill of exceptions should be framed; whether, as in the case of *Keys v. McFatridge*, (1) lately decided in this Court, it is most proper to state the *facts* that were proved; or, as in the case before us, to give a detailed statement of what each witness swore; there may be some doubt; but I think either may, according to circumstances, be proper, and that it might be unsafe to confine it to the one or the other mode; and, more especially, that it would be unsafe to confine it to the mode adopted in the former case.

In the first case, where the motion is made purely on the ground of a mistake of *law* arising upon the *facts*, concerning which there is no controversy, as in the case of *Keys* and *McFatridge*, where all the testimony was on the part of the plaintiff; a general statement, that such and such facts were proved, is perhaps all that would be necessary; but where there is a contrariety of

(1) Note. See ante. p. 18.

evidence, or any inferences to be drawn by the jury, it might be unsafe to adhere to that course, especially if the motion should prevail, as thereby the province of the jury to infer facts, and to weigh and stamp on every part of the testimony its intrinsic value, might be invaded.

FEBRUARY,  
1818.

Bennett

v.

Hardaway  
Administrator of Jones

This doctrine will perhaps be well illustrated by an examination of the case before us.

I had at first thought this was a plain case of a mistake of the Court and jury as to the law arising on the evidence. I supposed there was no doubt but that a fiduciary possession was proved in the intestate of the plaintiff; and that, consequently, he could not recover on that possession: and had the Judge who heard the trial been of the same opinion, unless he had mistaken the law, he must have granted a new trial; and, on an exception taken on the other side, if he had confined himself merely to the statement that the fact so appeared in proof to the jury, and could not have been called on to detail the evidence proving it, we must have affirmed his judgment; but, had the case been brought before us in the way it now is, we might have agreed with the jury and reversed that judgment.

From the evidence in this case, admitting it all to be credible, (which we probably ought, there being no allegation to the contrary,) and that there is no material contradiction in it, (as I also incline to think,) the jury may have believed, from all the circumstances, that, although there was a trust between old Mr. *Bennett* and his son in law *Lark*, of which the intestate of the appellee might at some time or other have received information, that yet he may have had an adverse possession of more than five years under a total ignorance of, and in opposition to, that trust; or they may have believed, and that from the testimony of a witness introduced by the appellant himself, (who deposed, in substance, that *Bennett* told *Jones* the intestate to take care of the slaves in controversy, as, after the death of Mrs. *Lark*, his mother in law, they might be of use to him and his family,) that *Bennett* the elder had confirmed the gift to the intestate of the appellee, reserving simply a life es-

FEBRUARY,  
1818.

Bennett

v.

Hardaway  
Administrator of Jones.

tate to his daughter Mrs. Lark, whose claim is not the ground work of this defence, (she having always acquiesced in the possession,) but which is asserted by the appellant as Executor of *Bennett*, and who, in that character, claims a right to hold possession. But if this Court would not think itself justified in setting aside a verdict in this case, corroborated as it is by the approbation of the Court, (and on this ground alone, on a more minute view of the testimony than I had at first taken, I am not for interfering therewith, but for affirming the judgment,) it does not follow that the Court would, or ought to have given a different judgment, if a new trial has been granted, and, with that difference only, the case had appeared before us precisely as it now does.

In cases of new trials, resting, as they do on sound discretion, I am not for restricting the course that is to be pursued by the Courts in presenting, to the appellate jurisdiction, (as they must be presumed always desirous to do,) THE VERY TRUTH AND JUSTICE OF THE CASE as it appears before them, or for occluding to the parties any course which may be necessary for that purpose; leaving it to the vigilance, wisdom, integrity and independence of the Courts to prevent, in this, as in all other cases, any improper use which may be made of, or advantage gained by the rules and course of proceeding.—No system of practice can be perfect and unsusceptible of abuse; and I fear that, in this case, a restricted course will be most liable to perversion.

If I am right, however, that a Bill of exceptions will lie to a judgment granting or refusing a new trial on the ground that the verdict is contrary to the weight of evidence, (and I fear we would be going too far to say that, if a Court should grant a new trial where the evidence preponderates in favour of the verdict, or where the case mainly turned on the credit due to witnesses, arising, either from a conflict between their statements, or upon discrediting proofs, no bill of exceptions would lie,) I can't perceive how such a case could be presented to the appellate tribunal without a detailed statement of the evidence. But, if we decide that such detailed statement,

in all cases, is improper, we in effect decide that no Bill of exceptions will lie in the case last supposed.

Judge ROANE pronounced the Court's opinion, as follows.

This is an action of detinue brought in the Superior Court by the appellee against the appellant. On the general issue, a Verdict was found for the plaintiff. A motion was immediately made for a new trial; but it was adjourned over until the next day, when the motion was overruled. The defendant excepted to the opinion of the Court, prayed that the evidence might be certified of record, and, that being done, appealed to this Court. It is not shewn that the evidence was taken down at the trial, nor that it was then taken down from the mouths of the witnesses: and yet the *whole evidence* given in, is stated, and not the *facts* merely as they appeared in evidence to the Judge. The Evidence, as it appears on the record; is conflicting and contradictory.

Although the Bill of Exceptions does not state on what ground the motion for a new trial was made, yet, having stated none other, and the evidence being contrariant and contradictory as aforesaid, we are obliged to infer that that ground was, that the Verdict was contrary to evidence: and the question is, whether it is competent to a party to carry *all the evidence* to the appellate Court, by a bill of exceptions, and, on the ground of it, to reverse a judgment of the Court below refusing to grant a new trial.

It does not follow that a Judge believes every Witness who gives evidence before him; as he may well hesitate to do, from the manner of testifying, and other extraneous circumstances; nor can he do it where they conflict with one another. It is evident, therefore, that, in this case, the opinion of this Court might be founded upon the testimony of witnesses who were discredited both by the Jury and the Court below. This Court only sees the evidence on the *record*; and, on *paper*, the credit of every witness is the same, who is not positively impeached. This would be for this Court, not only to revise and reverse the opinion of the Court below, on a question,

FEBRUARY.  
1818.

Bennett

v.  
Hardaway  
Administrator of Jones.

FEBRUARY,  
1818.

Bennett  
v.  
Hardaway  
Administrator of Jones.

touching the weight of evidence, and the credit of the witnesses, but to do it in the dark, or, at least, with lights inferior to those possessed by that Court. That Court, while it can faithfully transmit to this, the actual words spoken by the witnesses, can give it no *fac simile* of the manner of testifying, the hesitation or partiality manifested on the trial, or the like. With respect to these important circumstances, as they relate to the weight of testimony and credibility of witnesses, this Court is entirely in the dark:—the advantages are exclusively confined to the Court of trial.

It is an important principle that the revising Court should have the same lights, and act upon the same *data* as the inferior Court. This is always so, where the case depends upon a question of law; for that question, being permanently spread upon the record in the trying Court, is carried up to all the revising tribunals. It is a further principle, equally important, that, where this advantage is wanting in the revising Court, the judgment of the Court below will preponderate. On this principle this Court acted, in the case of *Chaney v. Saunders*, 3 *Munf.* 51. On this principle, it is held, in England, that a new trial will be granted, after a trial at bar, rather than after trials at *nisi prius*; because the former is founded upon what appeared to the *whole Court*, whereas the latter are founded upon the opinion of a single Judge.—(1 *Burr.* 394.) On this principle it is also held, that, where there has been a *view*, the Court will not, except for some very special reason, grant a new trial; because the Jury may have been influenced by what they *saw* on the view, and which the Court did not see. (6 *Bac.* 568.) This last position is entirely analogous to the case before us, and is decisive of it. The Jury and the Court below saw that which this Court cannot see. They had, or may have had, the most cogent reasons for discrediting witnesses, on whose testimony, (it appearing only on paper,) this Court might found its judgment.

We are, therefore, of opinion, that the bill of exceptions, as now exhibited, was not properly taken, and, therefore, that it furnishes no just ground to reverse the judgment.

Whether a party can, on overruling a motion for a new trial, on the alledged ground of the verdict being contrary to evidence, require the Judge to state in a bill of exceptions the FACTS as they appeared in evidence to him, and carry up the case to the appellate Court thereupon, is a different question. We are inclined to think it has been affirmatively settled, by the admissions of this Court, and the practice of the Country. In that case, the exception is not liable to the objection existing in the case before us. The appellate Court does not in that case depart from, or over rule the decision of the trying Court, as to the weight of testimony, or the credit due to any witness. It only acts upon his own certificate and acknowledgment of his opinion upon the subject. Such a bill of exceptions may be likened to the report of a *nisi prius* Judge in England; which, as to the facts, is conclusive with the Courts of Westminster Hall. It does not, like the bill before us, bring the whole matter again into controversy. It does not lengthen the record beyond all reason, by inserting, and that too after the witnesses have dispersed and departed, *all* the Evidence given in at the trial. It only states, briefly, the facts, as they appeared to the Judge, and are admitted by him to have been proved; and, in consequence of such his admission, the appellate Court founds it's decision upon the same facts as those which governed the Court below. There are also other circumstances favouring an appeal, or a bill of exceptions, of this last character. They result from the nature and organization of our Courts. The Members of the County Courts are perpetually changing, and those of the former District Courts changed at every term. If no appeal could lie from a decision on a new trial, and the same judges could not attend at the next term, or even on the next day, there could be no adjournment of the question; the decision must, therefore, be made off-hand, by which great injustice might ensue:—and if a decision, by not being promptly made, could not be made at all, (owing to a change in the identity of the Judges,) parties would often be driven into Courts of Equity to obtain a new trial; as has often been done, in

FEBRUARY:  
1818.



Bennett  
v.  
Hardaway  
Administrator of Jones:

FEBRUARY,  
1818.

Bennett  
v.  
Hardaway  
Administrator of Jones.

this Country, from the necessity of the case. In this view, too, less objection would result from giving a speedy, and even a hasty decision, on a motion for a new trial. If, from that cause, an error should intervene, the bill of exceptions having stated the facts as they were actually proved on the trial, the error could be regularly corrected in the appellate Court.

Although the ground of this reasoning fails, in part, as to the Superior Courts of law, by the permanent assignment of the same Judge to the respective Courts, it still holds as to the County Courts, and formerly held as to the District Courts. For this reason, and because we see none of the evils resulting, which exist in the case before us, we should be disposed to entertain a bill of exceptions of the description last mentioned. But the objections now taken to the bill before us must prevail, and repel it from the consideration of the Court.

We are, consequently, of opinion, to affirm the Judgment.

Decided,  
Feb. 24th,  
1818.

### Bray against Dudgeon.

1 Where the personal property of the Wife is so settled, by a Deed executed before the marriage, and duly recorded, that, upon her dying intestate in her husband's lifetime, the trustee is to convey the same to her legal heirs; her nearest blood relation is, in such an event, entitled to the administration of her estate, in preference to her husband. (1)

PREVIOUS to the marriage between *George Dudgeon* of the County of James City and *Elizabeth Bryan* widow of *Symkin Bryan* deceased, a deed of marriage settlement was executed by the said intended husband and wife, and *William Browne* their trustee; conveying all her personal property, in trust for the said *Elizabeth* until the marriage; and afterwards, that the said trustee should, during the joint lives of her and her said husband, permit her to enjoy all the profits thereof, to

(1) Note. See *Cutchin v. Wilkinson*, 1 Call 1—6, in which case it was decided, that the person entitled to the estate is entitled to the administration also.

and for her own use and benefit; that, in case she should be the survivor, the property should be re-conveyed to herself at her proper costs and charges; but, in case she should die in the life time of her husband, the said trustee should convey the same to such persons as she by deed or Will should appoint; and, in failure of such appointment, then to her proper and legal heirs; which Deed was duly recorded.

FEBRUARY,  
1818.

Bray  
v.  
Dudgeon.

The said *Elizabeth Dudgeon* having died intestate, a motion was made to the County Court of James City by *George Bray*, "her nephew and nearest blood relation existing," that a certificate be granted him for obtaining letters of administration of her estate; he claiming the right to her property under the said marriage contract.

*George Dudgeon* her husband appeared, opposed this motion, and prayed that the administration should be granted to him; which the Court refused to do, but granted the same to *George Bray*.

Upon an appeal to the Superior Court, this order was reversed, and the administration granted to *George Dudgeon* the husband; no evidence being adduced by either party in the Superior Court, but the case being there decided entirely upon a bill of exceptions signed and sealed in the County Court, stating the facts aforesaid.

*Bray* appealed to this Court.

*Wickham* for the appellant.

*Upshur* for the appellee.

BY THE COURT. The Judgment of the Superior Court was reversed, and that of the County Court affirmed.



Decided,  
Feb. 24th  
1818.

## Findlay against Smith and Wife and others.

1. A devise of certain salt works to the testator's *Wife* and two near relations of his, during her life time, subject to the payment of sundry legacies to a large amount, was construed, in this case, as authorising the devisees to make unlimited use of the salt mineral, and of the woodland of the devisor from which fuel was supplied in his life-time for carrying on the works.

2 The law of *Waste*, in its application here, must be varied and accommodated to the circumstances of our new and unsettled country.

**ELIZABETH FINDLAY** an infant by *Alexander Findlay* her guardian, exhibited a Bill in the Superior Court of Chancery for the Richmond District, stating, that she was the niece and heir at law of *William King* late of Abingdon in the County of Washington, who died, some time in the year 1808, seised and possessed, among other estate, of certain salt works of great value, in that County; having first made and duly published his last Will, in which, among other clauses, was the following: "and during the life time of my *Wife*, it is my intention and request that *William Trigg*, *James King* and her do carry on my business in partnership, both salt works and merchandizing, each equal shares; and that, in consideration of the use of my capital, they pay out of the same certain legacies," therein after bequeathed: that *William Trigg* and *James King* took under the said devise; but *Mary* the testator's widow renounced the Will, and was thereupon regularly endowed of his real estate, and in particular, of the said salt works, and woodlands contiguous thereto: that she with the said *William Trigg* and *James King* took possession thereof, and carried them on jointly for their common benefit: that the said *Trigg* and *King* were since dead, and their devisees and representatives carried on the said salt works in like manner: that the said *Mary*, the widow and doweress aforesaid, intermarried with *Francis Smith*, who, together with the said devisees and representatives, were made defendants to the Bill; that the well from which the salt water was drawn, was out of repair, and had so caved in, that the same quantity of water per day, as formerly, could not now be drawn with safety; that it still continued to cave in, and was likely to fall in entirely, and be rendered useless, unless speedily repaired: that, instead of making the necessary repairs, the present occupants had commenced the sinking a new well, about forty feet from the old one, and of the same dimensions; intending, (as they said,) after getting below the level of the surface of the water in the old well, to excavate an

FEBRUARY,  
1818.Findlay  
v.  
Smith and  
Wife and  
others.

horizontal communication between the old and new wells: but the complainants supposed them to be in search of a new vein of water, or that, by means of the new well communicating with the old, they might draw from the source which supplied the old well double the quantity of water, to convert which into salt would require twice the quantity of wood now consumed: that, certainly, both wells were intended to be used: that the wood used in carrying on the salt works was procured from the lands of the said *William King* deceased, contiguous thereto, which lands were covered with fine groves of timber, but would be of little value when the timber was taken off, being generally too steep for cultivation: that the present occupants, tenants for life, had not the right to sink new wells, for the purpose of obtaining salt water in greater quantities than was drawn at the time of the said *King's* death, or for the discovery of new veins or bodies of salt water, *whereby the saline mineral might be entirely exhausted*, and the estate in remainder destroyed; nor to take more wood from the land than was necessary to manufacture the same quantity of salt, per day, as was made at that time; and that, if the said occupants should so draw a greater quantity of water, or consume a greater quantity of wood, they would commit *Waste*.

The relief sought by the Bill, was, that the defendants be perpetually enjoined from digging the said new well, or any other well for obtaining salt water, and *from taking more wood than enough to make 500 bushels of salt per day*; and that they be compelled to repair the old well and keep it constantly in good condition.

*Francis Smith* and wife, by their answer, stated, that the old well had so far gone to decay, at the death of *William King*, that all attempts made by the present occupants to repair it proved ineffectual: that in order to carry on the works, a new well, or some other mode of obtaining the water, had become essentially necessary: that the object they had in view, in sinking the new well, was to reach the present source or body of water, from which they intended to draw without being limited as to quantity, as they conceived that to be their right under the will. They admitted, that wood was an expensive

**PRESTON,**  
1818.

Findlay

v.

Smith and  
Wife and  
others.

article in making of salt; but insisted on their right, to take from the land as much wood as was necessary to convert into salt all the water that could be drawn, without any regard to the quantity or manner of obtaining it. As to keeping the Well in repair, it was (they admitted) their duty, while they occupied it; provided this could be done with reasonable care and diligence; but they denied that they were bound to do so at all hazards; and averred their belief that it was utterly impossible to secure the old Well from caving in, by any repairs that could now be made to it; that their digging a new Well was so far from being waste, that, on the contrary, they considered it an *improvement* to the freehold estate in remainder; more particularly, as the present occupants would expend two or three thousand dollars for that purpose, which they did not expect would ever be refunded to them. They denied the possibility of exhausting the saline mineral; stating sundry circumstances proving it to be inexhaustible; but, if it were ever possible to exhaust it, they insisted upon their right to do so; the quantity of salt, they were authorized to make, being *unlimited*.

The other defendants, by a joint answer, contended for the same unlimited right; and further stated that the devise to Trigg and King was charged with the payment of legacies to the amount of *seventy thousand dollars*; that the devisees derived but little if any profit from the use of the devisors' personal estate, as that had been exhausted in the payment of his debts; that the salt works were the only source from which funds could be drawn to pay those legacies; that the price of salt, both before and since *William King's* death, was very fluctuating; that there was another valuable salt work contiguous, belonging to General *Francis Preston*, which had been rented by the said *King* for a term of years, at the end of which, the said *Preston* might have put his works into operation, and thus have glutted the market: that, as all those facts were known to the said *King*, he never could have intended, in the devise aforesaid, to limit the devisees in the quantity they might

these to make: that they supposed the said devise was intended as a *benefit* to the devisees, who were his relations; but it would turn out entirely otherwise, if the construction contended for by the complainants were adopted; especially, as the tenure by which the devisees held was altogether uncertain as to duration: that the expense of making salt was much greater now than in the lifetime of King; supplies being dearer, and *fuel more difficult to come at*; and that the price had greatly diminished.

On hearing the bill, answers and exhibits, Chancellor TAYLOR's decree was, that the bill be dismissed with costs; from which the complainant appealed.

*Leigh* for the appellant.

*Wickham* for the appellees.

February 24th, 1818, the Judges delivered their opinions.

Judge COALTER. I shall consider the tenants in this case as holding estates for the life of Mrs. *Smith*, as well because it is so limited by the Will, as because that limitation is perhaps not done away, or enlarged to a fee, by a charge in gross upon the land, which the tenants might be compelled to pay, at all events, whether they received profits, or not, to the amount. (a) But taking it, at present, that they are only bound to pay the legacies out of the profits, if so much are received; leaving it as a question hereafter to be decided whether, in default of profits sufficient, they are or are not to be paid, should such question ever arise; I shall proceed to enquire whether the Tenants are to be laid under the restraint, as to the use of the water and fuel, prayed for, or any other restraint whatever?

(a) 4 Bac.  
Abr. Title  
LEGACIES &  
DEVISES,  
Letter C.; 6  
Co. Rep. 16;  
1 Eq. cases  
abr. 177.

First, as to the use of the water, and digging the new Well.

If this was a lease for life of the use of the salt well, I can see no reason why digging a new one within a small distance of the old, so as to communicate with the same fountain, should be restrained any more than opening new shafts to pursue the same vein of coal; (b) and the more especially as by such new shafts the whole vein

(b) 2 P.  
Wms. 388,  
Clavering v.  
Clavering.

FEBRUARY,  
1818.

Findlay

v.  
Smith and  
Wife and  
others.

may be exhausted, which it is not pretended could happen as to this fountain of water. I think, therefore, that the new Well may lawfully be dug and used, in the manner, and for the purpose stated in the bill and answer; and that, as any quantity of water might lawfully have been drawn from the old Well, so it may from the new, even if the fountain itself should be dried up thereby, but which is believed to be impossible.

Second, as to the use of fuel.

There seems to be no doubt that the devise of the *salt works* is not to be restricted to the *well* alone, but that it extends also to the use of that mountain woodland which seems to have been acquired for the purpose of supplying fuel, without which the salt water would be of little use. The Bill itself seems to admit that a use of fuel to the utmost extent that the testator used it, would be properly taken according to the intention of the Will, and would not be waste. But the extent of the woodlands, their capacity of re-producing timber of equal value for fuel with that now upon them, and whether the wood-cutting proceeds more or less rapidly than such re-production, is not stated; nor does it appear that fuel can otherwise be procured. If a restraint is to take place, the use by the testator might be an improper standard, as he may have used it imprudently, or not to the extent that prudence would admit, or to which he would have used it on the increase of his funds, or as the demand for the article, on the competition in market, which has since taken place, would require, in order to continue the profits as great. It is therefore possible that a more full development of facts might change my opinion; these cases depending very much upon the circumstances attending each case; and consequently, any opinion now given by me, perhaps, ought not to conclude the parties, should a different case hereafter be made out; and will certainly not be intended to authorize malicious or extravagant waste, and which a tenant without impeachment of waste would be restrained from committing.

Considering this then as a devise as well of the use of the water as of the woodland for fuel, and that the use of the former is unlimited, is the use of the latter unlimited also?

Let us consider it, in the first place, by analogy to House-bote, Fence-bote, &c. The house or the field, which is the principal, may be used, during the term, to any extent, not amounting to waste, and may be kept in constant repair, although it may require all the timber or fence bote on the land, for that purpose; and so of fire-bote. The party having the right to these botes, and using them in the regular way, can not be restrained from taking the whole, if such use requires the whole. So, here, the Well is as the field to be cultivated, and requires a use of wood commensurate with the use of water, and, if *prudently* used to that extent, any other restraint would seem contrary to the principle above declared in the cases of botes.

But, again, in the case in *Abbott* 234, which was an action of waste for felling oaks, &c., the defendant pleaded that he had a lease to him of all mines &c., and that he felled the oaks to make certain utensils about the mines, without which they could not be used. It appeared that the Landlord had been in the habit of taking the same kind of timber for the same purpose, and also the Tenant, on some previous occasions. The maxim, "*that the grant of a thing carried all things included without which the thing granted could not be had,*" was held not to avail the defendant in this case; for that grant is to be considered of things *incident* and *directly necessary*. But, suppose the use of timber, for these purposes, had in that case been *incident* and *directly necessary* to the use of the main thing granted, or had been granted also with it, (one or the other of which seems to be the case here,) could the party have been restrained, if, in using the mine to the extent he had a right to use it, it became necessary to use the whole of the timber for these purposes?

This case too supports my position that the use by the Testator is not a proper criterion in favour of a Tenant,

FEBRUARY,  
1818.

Findlay  
v.  
Smith and  
Wife and  
others.

FEBRUARY,  
1818.

Findlay

v.  
Smith and  
Wife and  
others.

as the owner of the fee may waste or use his timber as he pleases; and if it is no criterion in his favour, it ought not to be against him.

But this case may perhaps be placed on yet higher ground in favour of the Tenants, who, if I am not mistaken, may be considered as *without impeachment of waste*, or having an unlimited right to use the fuel, in order to effect the objects of the testator. I presume express words to that effect are not necessary in a Will, but, in this respect as in all others, the intention shall prevail. In 1 *Bro. Ch. cases*, 166, a Testator devised land to his wife for life, and, by a codicil, he says, "Whereas, by my Will, my Wife cannot cut any timber, now my Will and mind is that she may, whilst she continues my widow, cut timber, *for her own use and benefit, at seasonable times in the year.*" Under this power, she began to cut and sell. It was contended that she had not a right to cut timber *for sale*, but only for her own use on the estate, and for estovers. The Lord Chancellor utterly rejected this idea, that she was only entitled to cut for her own use on the estate &c.; and said she was entitled to cut every thing that could be called timber; in other words she was tenant without impeachment of waste. And in 1 *Eq. cas. abr.*, 221, it is said, "if there be a Jointress with a covenant that it shall be worth such a yearly value, though her estate be not without impeachment of waste, yet she may do waste to make up the defect in value, and equity will not prohibit."

The parties here do not take by contract wherein each party would seek to make the best bargain, but, being the one the wife, and the other near relations either of the testator or his wife, were themselves objects of his affection and bounty: and, by means of this devise, too, other near relations and objects of very extensive bounty, are intended to participate in his munificence. He had no children in whom to vest this large estate, and, having numerous collaterals, he seeks to make a provision for them, by inducing the devisees of his capital, whether vested in the *salt works*, or in *merchandize*, to take the

management thereof, and devote their time and labour, not only for their own benefit, as objects nearest his affection, but to raise extensive legacies for his other relation; providing, in case he should have a child, this arrangement should not take place. For what purpose should he limit the use of this property, in favour of one collateral relation, when such limitation might prevent, within the life of his wife, the making a sufficient clear property to pay the legacies to others, and might also prevent the wife, and the other devisees of the life estate, from that gain which they had a chance to make, during the said estate, and which was as well the desire of the testator in their favour, as the great inducement on which they would be expected to undertake so important and hazardous a business? Suppose the legacies had failed, in consequence of these devisees not pushing the business as far as the funds placed in their hands would justify; could they be considered as fulfilling the object and desire of the testator, or acting justly by the legatees?

For these reasons, my strong impression at present is, that the Testator intended a free and unlimited use of his capital; whether consisting of monies, salt mineral, or woodland; especially, as the quantity of the latter may have been so great as that he may have supposed the capital given, and it's probable increase, could not, during one life, produce a lasting bad effect to the remainderman, and was therefore willing to risque this in favour of persons equally dear to him, and as a boon to them for undertaking the task.

It is not contended, (nor do I intend to say such allegation would alter my opinion,) that any new Capital has been, or is likely to be introduced, or that the money part of it turned out to be greater than was expected by him. On the contrary, it is stated that the reverse is the fact as to the mercantile transactions, which have been absorbed by the payment of debts; so that a large portion of the bounty which these parties were expected to take, (and, consequently, their means of carrying on the works still more extensively,) has failed.

Upon the whole, I am for affirming the Decree.

FEBRUARY,  
1818.

Findlay  
v.  
Smith and  
Wife and  
others.



FEBRUARY,  
1818.

Findlay

v.  
Smith and  
Wife and  
others.

Judge CABELL. The law of waste, in *England*, varies and accommodates itself to the varying wants and situations of the different counties in that country. Thus, what is waste in one county, is not waste in another.— On the same principle, the law of waste, in its application *here*, varies and accommodates itself to the situation of our new and unsettled country.

The questions in this case, as to the rights of the appellees under the Will of *William King*, relate to the use of certain water impregnated with salt, and to the use of the wood, on the lands of the said *King*, necessary for converting that water into salt.

The clause in *William King's* will, on which this controversy depends, is in the following words. "During the life time of my wife, it is my intention and request that *William Trigg, James King* and her do carry on my business in co-partnership, both Salt Works and Merchandizing, each equal shares; and that, in consideration of the use of my Capital, they pay, out of the same, the following legacies."

The legacies are then specified, amounting, as appears from the answers, to about \$70,000. I refer to the answers, because the amount cannot be ascertained from the Will itself, as many of the legacies are given to persons described, not by name, but as the children of certain parents, without mentioning the number of children. As the Answers, however, are not replied to, the facts which they state in relation to the controversy, whether responsive to the Bill or not, must be taken to be true.

First, as to the water.

The answers, entitled to respect as aforesaid, shew that the new Well which the appellees are sinking, is not for the purpose of reaching any new vein of water; but as the only practicable mode of using the old vein. The case of *Clavering v. Clavering* (2 P. Wms. 388,) is conclusive to shew, that tenant for life, of Coal mines, even when not without impeachment of waste, may open new pits or shafts for working the old vein of Coal. The reason on which that case was decided applies forcibly to

this; viz. that otherwise the works could not be carried on. The objection to the new Well being thus removed, the question is only as to the extent to which the appellees may use the water of the old vein: and, on this point, it is contended by the appellants, that no greater quantities ought to be used than were used by King himself about the time of his death. In England, a tenant for life or years, of land in which there were mines of coal, or the like, opened at the time of the lease, may work them and take the profits, even although the lease does not mention the mines; (*Co. Lit.* 54, b,) and I have been unable to find that the tenant in such case was ever restricted in the use of the mine, even although such use should entirely exhaust it before the determination of his estate. But the facts stated in the answer in this case, lead to the belief that the saline Mineral is inexhaustible. These facts were well known to *William King* the testator. When therefore, he expressly granted by his will, to the appellees, the use of this water, he could have had no possible motive to restrict them in its enjoyment: and, in the absence of all express restrictions, it will be difficult, in such a case, to raise them by implication.—There are, on the contrary, the strongest circumstances in the Will itself, to shew that he intended no restrictions whatever. The tenants for life were his wife, his brother, and the husband of his niece. He intended to give them a beneficial interest. When, therefore, he limited its duration to the life of *Mrs. King*, which might terminate shortly after his own, and charged it with the payment of \$70,000, a considerable part of which was payable in a few years after his death, it can hardly be supposed that he intended to restrict them in the use of the salt water, (perhaps the principal source from which the legacies were to be raised,) especially when he considered that water to be inexhaustible. Thus to restrict them, might be to defeat, entirely, the bounty intended for them.

I do not contend that the tenants for life became bound, by accepting the devise in their favour, to pay, at all events, the several sums directed to be paid as the consideration of that devise. I believe they were bound to

FEBRUARY,  
1818.

Findlay  
v.  
Smith and  
Wife and  
others.

FEBRUARY,  
1818.

Findlay

v.

Smith and  
Wife and  
others.

pay out of the *profits* only; and that the determination of their estate, before the profits could pay the debts, would discharge them from the payment of the residue. But they would be bound to the extent of the nett profits.— Suppose then, Mrs. King should die precisely at the time that the profits should amount to \$70,000, it is clear that the tenants for life would not receive one cent for themselves. A construction leading to such a result, ought not, I think, to be favoured:—and, even as to the legatees of the \$70,000, who were his near relations, a restricted use of the water might have protracted their payment to a most unreasonable length of time. If it be said that these legacies are so charged on the Capital, that they would not be lost by the death of the tenants for life, but that the reversioner or remainderman would be liable for them; this would only shew that he has the less reason to object to such use of the Capital by the tenants for life, as would enable them to discharge the legacies.

On these grounds, I do not think the testator intended any restriction in the use of the water.

Secondly. The remaining question is as to the wood necessary for converting the water into salt.

The Will requests the Tenants for life to carry on his “business, in copartnership, both Salt Works and Merchandizing.” Fuel was an essential article for carrying on the Salt Works; and the wood on the Testator’s lands had been generally used for that purpose. The Bill itself states that the lands are of little value for cultivation, being generally too steep for that purpose; but are very valuable as affording fuel for the works. It expressly admits the right of the tenant for life to use as much of the wood as *William King* himself used at the time of his death:—and, even without that admission, I presume no one would hesitate in pronouncing that the will gives the right to use *some* wood in carrying on the Salt Works; for they are to be carried on with the Capital of the Testator, consisting, in part, of the water and the wood.— The only question is, whether the Testator intended any restriction, as to quantity, so far as the wood is used in

prosecuting the salt works. And I will here observe that the arguments urged to shew a right to an unlimited use of the water, apply with equal force to a like use of the wood. They need not, therefore, be repeated.— And if, as I have endeavoured to prove, the testator intended an unlimited use of the water, can we suppose that, in granting the use of wood for that purpose, he intended to limit that use? I humbly conceive that every principle of just construction would forbid such a conclusion. I conceive the use co-extensive with the object, which, in this case, is unlimited. This opinion is strongly fortified by the law on analogous subjects. In the cases of House-bote, hay-bote, plough bote, &c. the tenant is unrestricted so long as he does not exceed what may be necessary for the purpose; (7 Bac. ab. 254, and the cases there cited) so, likewise, a tenant who is generally restrained by the nature of his estate from cutting down timber, may nevertheless cut down timber for the purpose of repairing houses; nor is there any case in the books which I have seen, shewing that he may not use as much as may be necessary for such lawful purpose; even although he should cut down the only timber tree on the land. Where there is a right to use a thing at all, the right goes to all the extent which a lawful object may require. In the case before us, the object of converting the water into salt is a lawful one under this will, and is unlimited in the extent to which it may be carried: the use of the means by which the testator intended it should be accomplished, is, therefore, equally unlimited. We have before seen that a tenant for life of a mine of coal, may use it till he exhaust it, even although the interest of the reversioner or remainderman may be thereby entirely destroyed. If this be the case when the thing itself is consumed by the use, never to be reproduced, a fortiori, the right exists in the case of wood which will reproduce itself in a series of years.

The case of Lord Darcy v. Ashwith, (Hob. p. 234), has not, as I conceive, any application. That was a case depending on a lease, and the point decided was that the lease did not give the right to use any timber for

FRANKLIN,  
1818.

Findlay

Smith and  
Wife and  
others.

FEBRUARY,  
1818.

Findlay

v.  
Smith and  
Wife and  
others.

making utensils for working the mines. The present case is one depending on a *Will*, in which, it is admitted by all, an intention is manifest to give the right to use some wood for carrying on the contemplated business.— The question in *Hobart* was whether there was *any* right, and it was decided the lease gave *none*. Here the *right* is admitted to be given by the *Will*; and the only question is as to the *extent* of that right; which, for the reasons above mentioned, I consider to be unlimited.

This is a case depending on a *Will*; and in such a case the intention governs. The tenants for life were the nearest and dearest objects of the testator's affections and bounty. I cannot impute to him the intention contended for by the appellants; for it might, in consequence of the increased expense of making salt, and the diminished price of the article stated in the answers, protract the payment of the legacies charged upon the life estate, till that estate might reasonably be expected to expire; and, in that event, convert these near and dear objects of his affections, literally, into hewers of wood and drawers of water, for the sole benefit of others less dear to the Testator.

Nor am I for sacrificing the rights of the reversioner or remainderman. He may prevent any malicious waste, by application to a Court of equity. His rights are farther protected by one other circumstance; that the use of the wood and water will always be regulated by the demand for salt; and, in the absence of all positive restrictions by the testator, it is fair to presume that he considered the restriction which would necessarily result from the limited demand for salt, as being abundantly sufficient.

I am for affirming the Decree of the Chancellor.

Judge BROOKE was of the same opinion.

Judge ROANE. This is a bill of Injunction, brought by the devisees in remainder of *William King* deceased, against two of his devisees for life, and his widow. It prays to enjoin them from committing waste, by opening Salt-Wells, and cutting and destroying timber, upon the premises therein mentioned. The bill is brought upon

the avowed assertion of an intention, as well as a right, on the part of the appellees, to open new wells at pleasure, and to use the water issuing therefrom, and also the wood standing on the premises, without stint or limitation. This threat and avowal is sufficient to justify the preventive interference of the Court, upon the authority of the case of *Gibson v. Smith*, 2 Atk. 183, if the case made out should, in other respects, warrant such a measure.

FEBRUARY,  
1818.

Findlay  
v.  
Smith and  
Wife and  
others.

As it is asserted, and not denied, that the saline Mineral is inexhaustible, and, it follows, that no injury is done to the inheritance by using all the *water* issuing from it, I shall not stop to consider whether the defendants have a right to open new wells, for the purpose of obtaining it. This is a point which, under other circumstances, might admit of controversy. I shall proceed upon the admission of this right; and then the question is narrowed to the enquiry, whether that right carries with it a right to cut down and destroy *all* the timber existing on the premises.

Before I go into that question, I will remark, that none of the appellees have more than an estate for life, in the premises. The widow renounced the devise under the Will, and claims and holds the premises, merely in right of dower. As for the other appellees, they hold only during the life of the Widow, by the *very terms* of the Will. This circumstance, (standing alone,) would exclude them from taking a fee, (*Cowp. rep.* 840.), even if the charge upon the land had been of a sum in gross. They do not take a fee, for the further reason, that the charge is not of a sum in gross, but the legacies are payable out of the *profits* only; and those payments, in general, are postponed to distant periods. 4 *Bac. Abr.* 251. The devise is of the use of the Capital, and the legacies are to be paid out of the same; that is, out of the use, or profits of the Capital. There is no pretence to say, from any *facts* stated in this record, that these profits are not entirely adequate to the payment, within a reasonable time:—but, if that incompetence were even shewn, it would not follow that the rights of the tenants would be

FRANKLIN,  
1818.

Pinckney  
v.

Smith and  
Wife and  
others.

enlarged thereby. The terms of the Will must still prevail, as the devisees could not be thereby *injured*. As the appellees have not a fee, they are only tenants for life of the premises. There is no clause in the Will exempting them from liability for waste. As to waste, they stand on a common ground with other tenants for life, except so far as a difference may result from the nature of the premises in controversy. If a difference does not result from this cause, it can not from the omission, to restrict waste, in the Will. That omission became unnecessary, from the limited nature of the estate which was granted. The estate granted was only an estate for life; and it is incident thereto that waste shall not be committed. It would have been a work of supererogation to have inserted such a restriction; and the question may be properly retorted, why, if it were so intended, was not waste specially permitted by the Will? This is not only not done, but the contrary is done, by granting an estate which carries with it the restriction, as an incident. The silence of the Will, in this particular, can not weaken the rights of those in remainder. It can not destroy rights conferred by the law.

In considering what is waste, in this Country, it is to be remarked, that the common law, by which it is regulated, adapts itself in this, as in other cases, to the varied situation and circumstances of the Country. That can not be waste, for example, in an entire woodland Country, which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land, nor cultivate it without felling the timber. A clearing of the land, in such circumstances, would not be a lasting damage to the inheritance, nor a disherison of him in remainder, which is the true definition of waste. It would, on the contrary, be beneficial to him in remainder, so long as a sufficiency of timber was left. This variation of the law of Waste, not only exists in relation to a new Country, compared with a cleared one, but takes place as to different parts of the same Coun-

try. Thus, in England, some species of trees are held to be timber in some parts, and an object of waste, which are not so in others. These observations go to shew that the law, on this subject, must be applied with a reasonable regard to circumstances. It is believed, however, that no circumstances, any where, justify the cutting down all the timber on the inheritance. It is giving every thing to the particular tenant, in prejudice of him in remainder. This is particularly the case, in the present instance, when, by cutting off all the timber, the land is useless for any other purpose; it being stated, if not admitted, to be *too steep for cultivation*. As the tenant for life is to procure a subsistence, by cutting down the land for the purposes of agriculture, so the remainder man is also to be permitted to get a subsistence by the use of a *part* of the timber. The whole must not be taken from him, whereby he will not be able to make any salt; and, especially, where the land is unfit for any other purpose. Under that combination of circumstances, (which is the one before us,) the heir would literally starve, while the particular tenant was rioting in profusion. The claims of the remainder-man and particular tenant should both be attended to, and be adjusted by a scale which consults the interests of both. The latter should be permitted to receive the golden egg, but not to destroy the goose which lays it.

If there were no salt works in the case before us; if the controversy was merely in relation to a common tract of land, it is presumed the claim to destroy all the timber, would not be asserted. It would not be asserted, in the common case, where the premises, after clearing them, were useful for the purposes of cultivation; and much less in the case before us, where they are not so. Such a pretension would conflict with every principle of the law of waste, taken in relation to any Country. It would inflict a lasting damage on the inheritance. If that could not be done directly in that case, neither can it be done circuitously in this. It makes no difference to

PASQUANT,  
1818

Findlay  
v.  
Smith and  
Wife and  
others



FEBRUARY, 1818. the remainder man, whether his inheritance is directly or indirectly destroyed.

Findlay  
v.  
Smith and  
Wife and  
others.

These remarks go to shew that, while there need be no restraint upon the particular tenants as to the water, for the reason that it can not be exhausted, the case is otherwise as to the wood. It is said that the wood, in this case, is an incident to the water. Without stopping to enquire whether it be so or not, it is an incident as well for the benefit of the heir, as the particular tenant. If it is an incident, it should attend on, and its continuance should be commensurate with, that of the principal subject. The tenant should be permitted to use the incident, but not to *destroy* it. Such a destruction would be as fatal to the interests of the heir, as that of the principal subject itself. In relation to this incident, (if it be one,) as well as in relation to cutting timber in ordinary cases, the rights of both the parties should be settled, by a scale of exact equity and justice. The sense of the deviser, as to what the interest of the heir required, is ascertained by his own conduct during his lifetime. It is asserted, (and perhaps admitted,) that he purchased the wood, (in part,) to boil his salt with; and it is also shewn that Mr. *Preston*, with a view to save his wood, suffered his works to lie idle. It is admitted that salt can not be made without wood; but the conduct of Mr. *King*, a judicious owner of the inheritance, proved not only that it *might*, but that it *ought* to be made, in part, by wood other than that standing on the premises. It can be no hardship to impose terms on the particular tenant, in favour of him in remainder, which a judicious man, having both interests united in his person, imposed upon himself. This is, especially, the case, when those restrictions are precisely such as have been prescribed by the wisdom of the common law;—by that law which equally regards the just rights of both the parties.

As to the use of the wood being limited only by the demand for the salt, the argument proves too much. It would graduate the law of waste, not by circumstances existing on and peculiar to the land in question, but by such as are extraneous and collateral. It would go to justify a lasting damage to the inheritance, where the

land is contiguous to a large market town, or to navigation, when it would not be tolerated, in a more remote situation. It would go, as applied to common cases, to permit a tenant to clear more or less of his land, according as he was more or less removed from a market town. It would lose sight of the criterion of waste, established by the wisdom of the common law for ages, which respects the actual detriment to the premises, and substitute an extraneous and imaginary one for the first time introduced into the code.

As for the idea that the wood may be destroyed, because it reproduces itself by time, that argument would go to overthrow this kind of waste altogether. Besides; in some soils, the new growth of timber not only takes a long time to arise, but is entirely of inferior quality. I may instance a particular region of Virginia, where, in place of hickory and white oak, the second growth is, entirely, of old field pine. Is it no injury to the inheritance, that this last kind of wood should be substituted for the former? Is the heir to be fobbed off, with a kind of wood which is unfit to make any implement of agriculture, and is even worthless as fuel?

As to any supposed analogy between this case and the right of taking fire-bote, house-bote, and plough-bote, *they* are limited by the actual demand required upon the premises, whereas the pretension now asserted is to keep pace with the foreign demand for the article manufactured. This pretension is reprobated, also, by the restriction as to the bote itself, that it must not be *unreasonable*. If more is taken than is reasonable, the act of taking the bote becomes an act of waste. You can not take *all* the timber for the purposes of bote, if it be more than sufficient. The particular tenant can not augment his implements and enclosures beyond all reason, and waste all the timber on the inheritance in erecting, and keeping them in repair.

The ideas now stated are not to be supported by any English authorities, *exactly* in point. The reason is, that there are no salt works in that Country. There are, however, English cases which are analogous, and, in principle, entirely apply.

FEBRUARY,  
1818.

Findlay  
v.  
Smith and  
Wife and  
others.

PERVANT,  
1818.

Findlay

v.  
Smith and  
Wife and  
others.

In 7 *Bac.* 362, it is laid down that, where a man grants all his mines of coals, when there are none open, although this may justify the tenant in opening new mines, he can not justify the cutting timber trees for making *punchons and other utensils* for working it, though, without them, he can not get at the coal; and, by *Hobart*, the law is the same if the mine was open at the time. I cannot perceive any difference, between this case and the case at bar,—which is not, (at least,) in favour of the latter. If the tenant in that case was not permitted to take timber to make the *necessary* utensils; if, without them, he could not dig *any* coal, shall all the timber be destroyed in the case before us, and the works be rendered useless to the heir, to satisfy the cupidity of the particular tenant?

In the case of the *Bishop of London v. Webb*, 1 *P. Wms.* 527, where a tenant for years, and that too *without impeachment of waste*, contracted with brick makers to dig and work up the soil, thereby converting the pasture field into a pit or pond, he was enjoined by the Chancellor from so doing, because it did a lasting injury to the inheritance; and this, notwithstanding the clause of impeachment of waste. There is no difference in principle between that case and the one before us. There is none between making the land wholly useless by digging it into pits, and by taking off all the timber, when the land itself is afterwards entirely useless, it being too steep for cultivation. If it be said that this land will hereafter grow up again in timber of *some* kind, that may not be in the time of him next in remainder. It is, *quoad* him, substantially, an entire destruction. It is, as to him, like destroying the land by opening of pits, in the case first mentioned. The objection prevailed in that case too, notwithstanding the demand for the bricks was unlimited; the land being near to London. The pretension now set up, of graduating the power by the demand, was in that case utterly disregarded and exploded. A safer and juster criterion was resorted to; namely, the common-law one, of restraining that which does a lasting damage to the inheritance.

Such be the law where a waste is permitted by the very terms of the lease, it will hold more forcibly in the case before us.—Such is the respect of the law for the interests of those in remainder; such is its repugnance to doing a lasting injury to the inheritance, that that injury is not permitted, even by the insertion of a clause in the Deed, authorizing the commission of waste. Such a clause is held only to extend to waste of a minor character.

Parliament,  
1818.

Findlay

v.  
Smith and  
Wife and  
others:

So in *Liford's case*, (11 Co. 49 a.,) it is stated that, where a complaint was made to the Parliament, (35 Ed. 1.,) that the Bishop of Durham was wasting and destroying *all the wood* appertaining to his church, by giving and selling, and ill-keeping, and by erecting forges of iron and lead, and burning coals &c., whereby the Church would be disinherited, he was inhibited from making waste, by a Writ from the Chancery; that is, by the ordinary remedy of the common law by writ of prohibition.

The principle of that case entirely applies in this. The destroying the timber was not the less waste because it was consumed in burning of coals, or in making iron and lead: nor would it have been less so, had the iron or lead been taken from the bowels of the *soil itself*. That would have been precisely analogous to the case before us, as the water manufactured into salt is taken from the premises. There is no difference in principle between the two cases.

I would therefore impose *some* restraint upon the appellants, as to wasting the timber. I would have some regard to the interests of those in remainder. Perhaps, however, the quantity used by *King* in his lifetime, may not afford the proper standard. He *might* have been too niggardly in the use of his own timber, rather choosing to purchase from others than to use his own—he might have wanted capital, or industry to carry on the salt-works to a proper and reasonable extent. On the other hand, he might have been too profuse in the use of his wood; he might have consulted his *future* interests too little. The *actual* state of the manufacture, also, may

February,  
1818.

Findlay  
v.  
Smith and  
Wife and  
others.

have been affected, at the time of his death, by various external circumstances. A criterion depending merely upon the *personal* character of the testator, or upon extraneous and fleeting circumstances, is of too uncertain a character to be resorted to as forming a proper standard. Besides; we have no account of the quantity of the woodland, to guide us in the present instance. The use of the wood may be extravagant, or otherwise, according as the *quantity* of it is greater or smaller. I would therefore establish a criterion as to what is a reasonable use of the wood, taking into consideration the interest of the remainder men, as well as of the particular tenants. In doing this, the *facts* should be also supplied, as to the actual *quantity* of the land, and the timber. It can safely be done, under the direction of the Court of Chancery, by the verdict of a Jury.

As to the right of the Court of Chancery to direct an issue in such cases, it can not be doubted. It is expressly avowed, under like circumstances, in the M. S. case of *Wilson v. Bragg*, cited in 7 *Bac.* 294. Nor can the power of the Court of Chancery to model and limit the exercise of the power, be for a moment doubted. It exists in the *stronger* case where the tenant holds the premises expressly without impeachment of waste. This is shewn by the case of *Abraham v. Bubb*, cited in 7 *Bac.* 290.

I will consent to the issue I have proposed, as the best means of graduating and adjusting this matter between the parties. I will take care of the interests of the tenants, but will not consent that the heirs should be despoiled of their inheritance. I will not sanction a proceeding which will leave them no stick of timber to boil salt with, when they shall come into possession. I will not authorise a course, in relation to the tract of land in question, (it being wholly unfit for cultivation after it is cleared,) which, in effect, will destroy the inheritance itself. This circumstance, in relation to the land, is not, however, *necessary*, in the view I have taken of the subject: it only makes my conclusion stronger.

A tract of land which, after it is cleared, is wholly unfit for cultivation, is rendered a non-entity by being so cleared. As for any useful purpose to the remainder-man, it might as well be sunk into the Ocean. If the timber shall ever be renewed upon it, it will not be in his time. It is, perhaps, more deteriorated than the land was, (in the case quoted,) which was destroyed by making bricks upon it. That land, though sunk into pits, might still have been built upon, and have answered that purpose. It was adjoining London. But this tract is in the western wilderness, and is therefore of no use (if it be not too steep) for the purpose of habitation. Every thing decided in that case, (*Bishop of London v. Webb.*) holds therefore *a fortiori* in this. It so holds, also, because there was a clause of impeachment of waste in that case,—and there is none in the case before us.

FEBRUARY,  
1818.

Findlay  
v.  
Smith and  
Wife and  
others.

I conclude, by repeating, that I will carry my view as well to the heir as the particular tenant. I will consult the interest of *future* times, as well as of the present; and *that*, especially, in relation to an article of indispensable necessity for the subsistence of the people.

This is my view of the subject; but I am overruled by the opinion of my brethren. That opinion gives the judgment of the Court, in the present instance. That judgment is, that the decree be affirmed, whereby the bill of the appellants was dismissed.

Decided,  
February 25,  
1818.

**Selby and wife and others, against Morgan's  
executors and others.**

A testator directing a tract of land to be sold, when the time is out for which it is leased, and the money to be divided between certain children of his, to them and their heirs forever; the legacy does not lapse by the death of any of them, after that of the testator, and before the expiration of the lease, but is a vested interest, and belongs to their legal representatives.

AMONG other devises and bequests, the Will of *William Morgan* of Berkeley county, (admitted to probat in 1788,) contained the following clause :—"Item, as there will be a remainder of Land not already willed, it is my Will that, when the time is out that it is leased for, that it be sold to the highest bidder, and the money divided between six of my children, *Abraham, George, Zaccheus, Raleigh, Sarah and Eleanor, to them and their heirs forever.*"

Before the term, for which the land in the said clause mentioned was leased, had expired, (but after the death of the testator,) two of the said devisees, viz, *George and Sarah* (who was then the wife of *Edward O. Williams*,) died.

Shortly after the end of the term, the land was sold by *Abraham Morgan* the surviving Executor; and being advised that the legacies to *George Morgan* and *Sarah Williams* were vested interests, and did not lapse by their deaths, he paid one sixth part of the money arising from the sale to the representatives of the said *George Morgan*; and conveyed, to a purchaser from *Edward O. Williams* husband of the said *Sarah*, part of the said land; which conveyance the said *Williams* accepted in satisfaction of his title to receive the said legacy, as lawful representative of his deceased wife.

A suit in the Superior Court of Chancery for the Winchester District was brought by *Walter B. Selby* and *Eleanor* his wife, (who was late *Eleanor Morgan* one of the devisees aforesaid,) *Margaret Morgan* and others, widow and children of *Zaccheus Morgan* deceased, and *Raleigh Morgan*, against *Abraham Morgan* the surviving executor, *Edward O. Williams*, and the widow and children of *George Morgan* deceased;—the plaintiffs (according to their construction of the will,) contending that the legacies to the said *George Morgan* and *Sarah Williams*, lapsed, by their deaths, as aforesaid, before the

term had expired, and ought to be refunded to the other devisees, (who were living at the time when the sale was to take place in pursuance of the Will,) and their representatives. The defendants by their answers maintained a contrary construction; the facts being in substance agreed on both sides. Chancellor Carr, on hearing the Bill, Answers and Exhibits, dismissed the Bill with costs; and his decree, upon argument by Wickham for the appellants and Leigh for the appellees, was affirmed by this Court.

FEBRUARY,  
1818.

Selby and  
wife

v  
Morgan's ex-  
ecutors and  
others.

### McRae's executors against Brooks and wife.

Decided,  
February 26,  
1818.

IN a suit for a legacy, brought by Brooks and wife against Richard McRae and Daniel Eppes executors of John McRae jr. who was executor of John McRae senr. Chancellor Taylor made a decree as follows:—

“The defendants Richard McRae and Daniel Eppes  
“admitting that their testator John McRae jr. had,  
“in his lifetime, in his hands, more assets of his testa-  
“tor John McRae the elder deceased than would be suf-  
“ficient to pay his debts and legacies, and that a suffi-  
“ciency thereof came to their hands for that purpose since  
“the death of their testator, the Court thereupon, (no  
“requiring a report of a Commissioner,) doth adjudge,  
“order and decree, that the said defendants do, out of  
“the said assets, pay to the plaintiffs the sum of 1061l.  
“13. 4. with interest on 885l. 15. 6 part thereof from  
“the 7th day of January 1814 till paid, and the costs of  
“this suit, if so much thereof they have; if not, that,  
“then, out of their own estates, they pay the same.”

The defendants obtained a Writ of Supersedeas from a Judge of this Court, stating three reasons in their Petition, viz:

out of their own estates.

2. A decree against executors for a legacy, tho' made upon confession of assets, and without their expressly demanding bond and security from the plaintiff, is yet erroneous, if it do not require such bond and security to be given before the defendants be compelled to pay the legacy. See *Stovall's executor v. Woodson and wife*, 2 Munf. 303; *Roster v. Webb*, 4 Munf. 77.

1 It seems, that, where a decree against executors, for a legacy, is made upon their confessing assets, sufficient to satisfy the same, (without specifying whether such assets consist of money or other property;) such decree may with propriety direct that they pay the legacy and interest, with the costs of the suit, out of the said assets, if so much thereof they have; if not,



FEBRUARY,  
1818.

McRae's ex-  
ecutors  
v.  
Brooks and  
wife.

1. Because the decree was, that they should pay to the plaintiffs the sum in question, *out of the assets of their testator, if so much thereof they had, if not, then out of their own estates*; whereas, they were advised, it ought certainly to have been either a decree *de bonis testatoris*, or a decree *de bonis propriis*; and that the alternative decree rendered in this case, partaking of both characters, but properly belonging to neither, was uncertain and erroneous.

2. Because, altho', where an account of an executor's administration is directed and taken in chancery, and it shews a balance in money due on his administration account from the executor to his testator's estate, it is proper to decree to the plaintiff his demand against the executor *de bonis propriis* (according to the resolution of the Court of Appeals in *Moore's executrix v. Ferguson*, 2 *Munf.* 421, and in *Sheppard's executor v. Stark and wife*, 3 *Munf.* 29,) yet, where, (as in this case,) the Court proceeds to decree upon a general admission of the executors, that more assets have come to their hands than sufficient to pay debts and legacies, without any shewing in the case that such assets consist of money,—in such case, the decree ought to be *de bonis testatoris*:—since the assets confessed to be in the executor's hands, may be choses in action, or other assets which are not immediately at command, instead of money, whereof the decree in this case supposes the assets confessed must necessarily be taken to consist; and an executor's own estate and person ought not to be subjected to satisfy a debt or legacy of his testator, unless it distinctly appear that he has a balance of money, of his testator's estate, in his hands to meet the claim; which does not appear in this case.

3. Because the said decree contained no order or provision for obliging the plaintiffs to refund, in case of debts afterwards appearing against the estate.

The following was the decree of this court:

The Decree is erroneous in this, that bond and security was not required, from the appellees respectively, to refund a part, or the whole of their legacies, if future claims should make it necessary.—The same is therefore

reversed, and the cause remanded with a direction that, in the decree to be entered, such bond and security be required.

## Abraham and others against Matthews.

Decided,  
February 27,  
1818.

UPON the trial of this cause, which was an action for freedom, in the Superior Court of Ohio County, the Court instructed the Jury, that, in the case of slaves brought into this State, from any of the United States, before the Act of 1792, (1) the fact of the master's having taken the oath required by law within ten days after removal, would be presumed from a lapse of *twenty years possession* without claim of freedom on the part of the slaves; so as to throw the *onus probandi* on the plaintiff suing for freedom; but this presumption might be met or avoided by circumstances. The Court, being then asked to direct the Jury that the infancy of the party was a circumstance which *would defeat* that presumption, refused to give such direction, but told the Jury that infancy was a *circumstance*, the *weight* and *effect* of which should be left to them.

A verdict was thereupon found, and judgment entered, for the defendant; which judgment was affirmed by the Court of Appeals; the record being submitted by the appellant's Counsel, without argument, and the appellee not appearing.

(1) Note. See Acts of October 1778, c. 1, 1785, c. 77. § 5; 1792, c. 1794, 1803, and 1814, c. 103. § 4.

may be repelled by circumstances.

2. Infancy of any of the slaves is not conclusive against the presumption; but a circumstance to be considered, the weight and effect of which should be left to the Jury.

1. In the case of slaves brought into this State, from any of the United States, before the Act of 1792, the fact of the master's having taken the oath required by law, within ten days after removal, should be presumed from twenty years possession of them, as slaves, without their claiming freedom; so that, in such case, the *onus probandi* in the suit for freedom should be thrown on the plaintiffs—but this presumption

Decided,  
February 28,  
1818.

## Guerrant against Bagby.

ON the 22d of June 1807, *Daniel Bagby* filed in the Clerk's office of Buckingham County Court a Caveat, previously entered with the Register of the Land office, against the issuing of a Grant to *Peter Guerrant jr.* for 420 acres of land, lying in the said County, described in the said Caveat as "being part of a survey of 500 acres of land surveyed for the said *Guerrant*, on the 22d of February 1806, by *John Patterson* the County Surveyor; 1st, because the original entry of the said *Peter Guerrant* does not include the said 420 acres of land; and because he had made a previous survey on his location aforesaid, and closed his lines, and obtained from the said surveyor a plat and certificate of the said 500 acres of land which did not include the said 420 acres:—2dly, because *Daniel Bagby* claims title to the said 420 acres, by virtue of an entry made with the same Surveyor on the 10th of April 1804, under an exchanged Land Office Treasury Warrant, bearing date the 8th day of June 1803, No. 1440, granted to *Richard Philips*, and regularly assigned to the said *Daniel Bagby*; also as assignee of *John Jones* by land office Treasury warrant, dated the 15th day of June 1803, No. 3622; also by virtue of an entry made with the said Surveyor on the 24th of November 1804, as assignee of *Thomas Patterson* by virtue of a Land Office Treasury Warrant, No. 3941, dated May 26th, 1804, and surveyed for the said *Daniel Bagby* by the said Surveyor, December 18th, 1804:—3dly, because *Daniel Bagby* claims title to the said 420 acres of land, by virtue of an entry made with the same Surveyor on the 9th of March 1807, by Land Office Treasury Warrant, for 420 acres of land, granted to the said *Daniel Bagby*, and bearing date the 4th of

1. In a Caveat case; if it be found by the Jury, or agreed by the parties, that, since the institution of the Caveat, a Grant from the Commonwealth of the land in controversy has been obtained by the Caveatee; judgment ought to be entered dismissing the Caveat; but such judgment to be no prejudice to any suit in Chancery which the Caveator may be advised to bring to vacate the said Grant, or any Grant that may issue to the caveatee in consequence of such judgment of dismissal; the judgment on the Caveat being, in that event, not pronounced on a comparison of the respective rights of the parties. (1)

(1.) Note. The Grant offered in evidence in this case, though bearing date since the institution of the Caveat, was founded on a *prior entry and survey, not caveated*:—but the opinion of this Court is expressed in general terms, that, "if it shall be found &c., that the appellant has obtained a *Patent* for the land claimed by the appellee, a judgment be entered dismissing the Caveat."

FEBRUARY,  
1818.

Guerrant  
v.  
Bagby:

" March 1807, No. 4402; by virtue of which said several Entries and Surveys, the said *David Bagby* has a better title to the aforesaid land.

A Jury, being impanelled according to law, on the 19th of March 1811, the facts in relation to the conflicting titles of the parties, were specially found; except the following, which *Guerrant the Caveatee* offered for the consideration of the Jury; viz, " that, on the 12th day of October 1800, he made an entry with the surveyor of Buckingham, for two thousand acres of land, by virtue of two land warrants, mentioned in the said Entry and lodged with the surveyor according to law, which entry was intended to cover any vacant land adjoining the furnace tract, as mentioned in the said entry.—that, on the 9th of November 1802, he renewed the same entry in all it's parts; and again, in like manner, on the 14th of March 1804; and no caveat hath been entered against the same; that, on the 10th of April 1804, five hundred acres of the said entry were dropped, and entered elsewhere; and, in like manner, 70 acres, on the 7th of Nov. 1804; that, on the 19th of Aug. 1805, the Surveyor of the said County proceeded to survey the said entry, and caused a plat and certificate of said survey to be made for him the said *Guerrant*, covering 420 acres of land adjoining the said furnace tract, and covering the land in controversy; against which survey, no caveat hath been entered.—that, in pursuance of the said Survey, and Plat and Certificate, the Commonwealth, on the 2d day of March 1811, hath granted to the said *Guerrant* 420 acres of land, being the land claimed by the Caveator:—that, in consequence of the entry of April 10th, 1804, and of another entry for 70 acres made the 7th of November 1804, the surveyor, on the 7th of November 1804, made a survey of 570 acres of land, closing the same by two blazed lines; and that the said two lines divide the lands comprehended in that plat from the land contained in the Caveatee's grant."

FEBRUARY,  
1818.

Guerrant  
v.  
Bagby.

To establish these facts, the Caveatee offered the said Entries, Surveys, Plats and Patent, and further offered the said Patent to shew that the land claimed by the Caveator was not waste and unappropriated:—but the Court, on motion of the Caveator, excluded the said Patent from the consideration of the Jury, “*as being obtained since the institution of this caveat, though upon a prior entry, and subsequent survey, which was not caveated*; the Court being of opinion, that the patent “*ought not to have any effect in the trial of this Caveat.*” whereupon, a bill of exceptions was filed, in which the said Entries, Surveys, Plats and Patent were set forth *in hæc verba.*

The matters of law arising upon the Special Verdict being argued, the Court entered Judgment for the Caveator, “*that he recover against the Caveatee his costs.*”

Upon an Appeal, the Superior Court of Law was of opinion, that there was no error in the said judgment, so far as it went, and that the same be affirmed; with a farther judgment, “*that no grant issue to the appellant on his survey, of the 22d of February 1806, of five hundred acres, for 420 acres part thereof, comprehend- ed in the appellee’s surveys of December 21st, 1804, and March 4th, 1807, filed in this cause; and that the appellee recover against the appellant his costs.*”

From this judgment, an appeal was taken to this Court.

*Bouldin* for the appellant.

*Upshur* for the appellee.

February 28th, 1818, Judge ROANE delivered the Court’s Opinion.

The Court is of opinion, that the judgment of the County Court is erroneous in this, that the survey and patent thereupon, offered in evidence by the appellant, as stated in the Bill of Exceptions, was improperly rejected; and that the Judgment of the Superior Court affirm- ing that of the County Court is erroneous. The same is therefore reversed with costs:—and this Court proceed- ing &c., it is considered that the judgment of the County Court be reversed, with Costs, and the cause remanded to the said County Court, with directions to that Court

to impanel another Jury to find such further facts as may be deemed material, and are not agreed by the parties; in which trial the evidence rejected as aforesaid is to be admitted if offered; and if it shall either be found by a Jury, or agreed by the parties, that the appellant has obtained a patent for the Land claimed by the appellee, a judgment be entered dismissing the *Caveat*; but such judgment to be no prejudice to any suit in Chancery which the appellee may be advised to bring to vacate the patent aforesaid, or any patent that may issue to the appellant in consequence of such judgment of dismissal; the judgment on the *Caveat* being, in that event, not pronounced on a comparison of the respective rights of the parties.

FEBRUARY,  
1818.

Guerrant  
v.  
Bagby.

**The President and Professors of William and Mary College against Hodgson and others.**

Decided,  
March 2d,  
1818.

WILLIAM LUDWELL LEE of Green-Spring in James City County, by his last Will, devised and bequeathed  
 “ to the President, Masters and Professors of William  
 “ and Mary College, and their successors in office for-  
 “ ever, five hundred Winchester Bushels of Indian  
 “ Corn, *which is to be PAID to them annually on the 25th*  
 “ *day of December*, for the use and benefit of a free  
 “ school to be established in the centre of James City  
 “ County;”—adding a clause in the following words,  
 viz; “ *one thousand acres of the Hot Water Tract of Land*  
 “ *is by my desire to stand pledged forever, for the FULL*  
 “ *support of a free school; directing that 1000 acres, part of a certain tract of land,*  
 “ *to be paid off by notes and bounds within twelve months after his decease, “ stand*  
 “ *pledged for ever, for the full and complete execution of this devise. By other clauses, he*  
 “ *bequeathed sundry pecuniary legacies to a large amount; directing particularly, in*  
 “ *each bequest, payment to be made by his Executors. He also emancipated all his*  
 “ *slaves, and devised to his sisters all the residue of his estate. It was decided, that*  
 “ *the devise to the free school was not a charge upon the estate generally, but upon*  
 “ *the 1000 acres of land only.*”

1. A testator devised to the President and Professors of a College, and their successors in office forever, 500 bushels of Corn “ to be paid them annually “ on the 25th “ of December, for the establishment and

MARCH,  
1818.

The President and  
Professors of  
William and  
Mary College  
v.  
Hodgson and  
others.

“AND COMPLETE EXECUTION of this devise;—the bonds  
“of which are to be designated by clear and obvious notes,  
“WITHIN TWELVE CALENDAR MONTHS after my de-  
“cease.”

The Will contained sundry other devises and be-  
quests, of which several were pecuniary and to a large  
amount. In every instance of a pecuniary legacy, pay-  
ment “by the Executors,” was particularly directed.

The following provisions were made concerning the  
testator’s slaves:—“Item, my will and desire is, that all  
“my negro slaves may, on the first day of January  
“next, be emancipated; that those who have arrived at  
“the age of puberty, and who chuse it, may be allowed  
“to settle on such part of my Hot Water lands as my  
“executors may designate, where I wish comfortable  
“houses to be built for them at the expence of my estate;  
“with a sufficiency of Indian corn to be allowed from  
“the same for their support for one year, and that they  
“be allowed to retain such tenements and settlements,  
“for ten years, free from any rent or charge whatever.  
“I give to Joe a Blacksmith all the tools in my black-  
“smith’s shop, with the use of the shop, free from rent,  
“during his natural life. All those under age of eight-  
“een years, I request my executors to remove to some  
“one of the United States North of the Potowmac,  
“where they may receive such an education as may be  
“suited to their several capacities, at the expence of my  
“estate; by which I trust they may be enabled to acquire  
“an honest and comfortable support.”

All the residue of his estate, whether real, personal  
or mixed, not heretofore in this instrument devised, was  
given to his sisters *Portia Hodgson* and *Cornelia Lee*, to  
be equally divided between them and the heirs of their  
bodies forever, &c., with a contingent limitation, by  
which the same might ultimately vest in *Henry Lee* eld-  
est son of General *Henry Lee*, and his heirs forever.

The President and Professors of William and Mary  
College filed their Bill in the Superior Court of Chan-  
cery for the Richmond District against *William Hodg-  
son* (who alone qualified as Executor,) and the said re-

aidary devisees; contending that the *estate generally* was liable for the annual delivery of the Corn bequeathed to the College; and that the pledge of one thousand acres of the Hot Water Tract of Land was only an *additional* security.

The defendants by their answers insisted, that the Complainants had no right to demand payment out of any other part of the estate; but that the said legacy ought to be held and taken as a rent, or annual, to be raised out of the said land; and that the Executor had caused the said one thousand acres to be laid off for the use of the Complainants under the said bequest, but they had not been willing to receive the same.

The cause was finally heard September 24th, 1808, when Chancellor TAYLOR "being of opinion, that the " 500 bushels of Indian corn devised by the said testator to the plaintiffs for the use and benefit of a free " school to be established in James City County, should " be charged on the said one thousand acres of land " only, and not on the whole estate of the said testator, " lest it might deprive some or all of the manumitted " slaves of the testator of that liberty secured to them " by his benevolence and humanity, which is supposed " to have been an act no less meritorious than the establishment of a free school; and if to deprive *them* of " their freedom would be against the clear and obvious " intention of the testator, it is supposed equally clear, " upon principle, that *other* objects of his bounty should " not be disturbed;" and it being admitted, by the plaintiffs, that the one thousand acres of land in the bill mentioned had been laid off and allotted by the defendants to the plaintiffs agreeably to the last Will and testament of the said *William L. Lee*; it was therefore decreed, that the Bill, so far as it required satisfaction out of the other parts of the testator's estate, be dismissed with costs. And this decree was affirmed by the Court of Appeals, on the 2d of March, 1818.

MARCH,  
1818.

The President and Professors of William and Mary College  
v  
Hodgson and others.



Decided,  
March 3d,  
1818.

## The Bank of Virginia against Ward.

1. The bona fide owner of a bank note, having transmitted one half thereof by the mail, which has been stolen therefrom, or is lost, can not demand payment from the Bank of any part of it's amount, in consequence of holding the retained half, merely; but he is entitled to demand the whole amount of he said note, on satisfying the Bank of the verity of the above facts, or establishing them by the judgment of a Court of Equity, and giving, in either case, a satisfactory indemnity, to secure the Bank against future loss from the appearance, and setting up, of the other half of such note.

UPON an appeal from a Decree of the Superior Court of Chancery for the Richmond District.

The suit was brought by *Fishback and Ward* merchants and partners carrying on trade at the town of Jefferson in the County of Culpeper, against the President, Directors and Company of the Bank of Virginia, to recover a balance claimed by the plaintiffs, on the ground that, having occasion to make a remittance of money to *Thomson and Maris*, their correspondents in Philadelphia, they divided, by cutting, four notes on the Bank of Virginia, (the numbers, dates and sums of money being particularly described in the Bill,) inclosed one half of each note in a letter addressed to the said *Thomson and Maris*, Philadelphia, and, on or before the 5th of January, 1811, put the said letter, with the halves of said notes inclosed, into the Post Office at Jefferson, Culpeper County, to be conveyed with the Mail according to it's direction; but, as the plaintiffs were informed, the said letter and half notes never reached the said *Thomson and Maris*, but were lost and destroyed: that the said Notes amounting, in all, to three hundred dollars, of which, three, amounting to two hundred dollars, were payable at the Office of Discount and Deposit of the Bank at Fredericksburg, the plaintiffs (after waiting a reasonable time to see whether the said half notes could be found, and having given notice of the loss, to the President of the Bank at Richmond, immediately after being informed of it,) applied to the agents of the said Bank at Fredericksburg for payment of the said notes, on or about the 4th of March 1811, and offered to give the said President, Directors and Company bond and security to indemnify them against any claim which might thereafter be exhibited against them, on account of said notes; producing, at the same time, the other halves of said notes, which they the plaintiffs retained; whereupon, the said agents refused to pay the said notes, but paid one half of the

three payable at Fredericksburg; that is, one hundred dollars; and informed the plaintiffs that the balance would be paid, probably, when a sufficient lapse of time had passed to create a strong presumption that the other halves of the said notes were destroyed, or would never appear; whereupon the plaintiffs delivered up the halves they had retained of the said three notes payable at Fredericksburg; that the plaintiffs applied again to the President and Directors of the Office of Discount and Deposit at Fredericksburg, through a friend and agent, and requested payment of the residue on said notes, and again offered, as before, bond and security of indemnification; when the said President and Directors declined giving any answer, until they could consult the President and Directors at Richmond, who afterwards directed that no farther payment should be made.

The plaintiffs, therefore, prayed such relief as would be just and equitable; exhibiting, with their Bill, a paper which they alledged was the half of one of the \$100 notes, (the only one remaining in their possession,) and repeating their offer to give the Bond of indemnification, with such security as the Court should approve.

The President and Directors of the Bank filed their answer, under the common seal of their corporation; requiring the plaintiffs to prove, that they were proprietors of the notes, and sent the halves of them by mail, as they alledged:—insisting, however, that, if such proof should be exhibited, the plaintiffs, by cutting the said notes in twain, and thereby disabling themselves from producing the whole notes, had voluntarily destroyed their own securities, and could not resort to the Bank for payment:—that, if the Court should be of a different opinion, yet the Bank was not liable to pay the money upon their producing the *halves only* of the said notes; 1st, because innocent holders of the other halves might with equal propriety demand it likewise; and the complainants, by the act of cutting the notes in two, may have contributed to bring such innocent holders into difficulties:—2dly, because it would not be in the power of the Bank to guard against surprize, as it would be

MARCH.  
1818.

The Bank of  
Virginia  
v.  
Ward.

MARCH,  
1818.

The Bank of  
Virginia  
v.  
Ward.

impossible to identify the correspondent halves; for the dates, numbers and letters of the halves produced will fit the same denominations on any other notes, or halves, of a similar description, as well as those from which the halves produced by the complainants were taken.

The defendants further answering said, that the payments made to the plaintiffs by the office of discount and deposit in Fredericksburg, were without the knowledge of these defendants or their predecessors, and therefore did not oblige the Bank to make farther payments; instead of which, the plaintiffs ought to refund the money already received from the said office of discount and deposit.

The plaintiffs replied generally, and took a deposition tending to prove that, in fact as alledged, they had put into the mail a letter containing the half notes described in the Bill; but no proof was exhibited that the said letter and half notes were stolen or lost, or failed to come to hand as directed. They proved also their offer to indemnify the Bank.

The defendants filed the *affidavit of William Ncker-vis*, (read by consent of parties,) in the following words:—"The half of a note of the Bank of Virginia for one hundred dollars, filed in the Superior Court of Chancery in the suit *Fishback &c. against the Bank of Virginia*, being shewn to me, for my opinion as to the power of the Bank to discriminate between the right hand half of this note, and the right hand half of other notes of the same description; I hereby certify that notes of the kind in question are filled with one number only on the left side; that one hundred sheets, or four hundred notes, are of the same date, which date is on the right hand side. By comparing the numbers and dates, it can be ascertained by the Bank Register, whether or not they agree as to a given hundred sheets; but, there being no other mark of discrimination, if notes be cut exactly alike, the half of one note will fit the halves of three hundred and ninety nine other notes, besides it's real corresponding half."

WM. NCKERVIS.

Chancellor TAYLOR decreed, that the defendants pay to the plaintiff *Ward*, (the surviving partner, *Fishback* being dead,) the sum of two hundred dollars, with interest thereon from the 17th day of September 1811, 'till paid, and the costs: but the effect of this decree was suspended until the plaintiff should enter into bond, with good security, in the penalty of four hundred dollars, with condition to indemnify the defendants against the claim or claims of any persons, who might hereafter claim against them, in consequence of having the possession of the halves of the notes, in the bill mentioned, and which were alledged to be lost or destroyed.

MARCH,  
1818.  
The Bank of  
Virginia  
Ward:

From this decree the defendants appealed.

*Call* for the appellants.

*Green* for the appellee.

Judge ROANE delivered the Court's opinion, as follows:—The court is of opinion, that the bona fide owner of a bank note, having transmitted one half thereof by the mail, which has been stolen therefrom, or is lost, can not demand payment from the Bank of any part of it's amount, in consequence of *holding the retained half, merely*; but that he is entitled to demand the whole amount of the said note, on satisfying the Bank of the verity of the above facts, or *establishing* them by the judgment of a Court of Equity, and giving, in either case, a satisfactory indemnity, to secure the bank against future loss from the appearance and setting up of the other half of such note.—But the requisite *proof* does not exist in the case before us; the half notes, on which the bill is founded, *not being specifically and satisfactorily identified, as the counterparts of the halves transmitted*, for want of which proof, the decree is to be reversed, and the bill dismissed.

Decided,  
March 10th.  
1818.

**Spindle's administratrix against Miller's ex-  
ecutors.**

1. An agreement for the sale of land being, that the Vendor shall make and execute deeds of Conveyance, and the vendee shall pay, on the day of the execution of the said deeds, part of the purchase money, and give bonds for the balance, as soon as the quantity, (supposed to be a certain number of acres,) can be ascertained by an accurate survey; the vendee is not bound to make the said payment, nor give bonds for the balance, until the vendor shall first have made or tendered the Conveyance; notwithstanding a survey ascertaining the quantity of the land has been made.

IN an action for breach of Covenant, brought by the appellees against *Lewis Spindle*, the declaration contained two Counts; each stating certain articles of agreement under seal, made the 5th of February, 1807, between *James Miller* (testator of the plaintiffs,) and the defendant, by which the said *Miller* bound himself to make and execute deeds of conveyance for a certain tract of land which he had sold to the said *Spindle*, on the following terms; "viz, that the said *Lewis Spindle* bound himself and his heirs to pay to the said *James Miller*, on the day of the execution of the deeds of conveyance for the said land, the sum of six hundred pounds, and to give his own (the said *Lewis's*) bond, or other bonds, approved of, and assigned by him, for the balance, whatsoever it might be, as soon as the quantity could be ascertained by an accurate survey of the same, which was supposed or estimated to contain about six hundred acres, at the rate of forty shillings per acre, the price agreed on by the said parties."

In the first Count it was said in substance, that, by an accurate survey of the land aforesaid made on the day of            in the year           , the quantity of the same was ascertained to be 651 acres; of which the defendant then and there had notice; that, on the day of            in the year            at the County aforesaid, he the said testator of the plaintiffs did well and truly execute unto the said defendant a deed of bargain and sale of, and did well and truly convey to him the said *Lewis* all and singular the premises sold "by him the

2. If the terms of the agreement be, that the vendor binds himself to make the conveyance, and the vendee binds himself and his heirs to make the payment, &c., on the day of the execution of the conveyance; and no conveyance be made or tendered by the Vendor in his lifetime, the vendee is not bound to accept a Conveyance from his heirs, but may waive the contract altogether.

said *plaintiffs*" to the said defendant, or agreed to be sold "by the said(1) *plaintiffs*" to the said defendant; and that he did in all things perform the covenants and agreements which in and by the said articles he was bound to perform on his part &c.; but the defendant had broken the same, in this, that he did not pay to the said testator of the *plaintiffs* on the day of the execution of the deed of conveyance for the said land, the said sum of six hundred pounds, nor at any time give his own bond &c. for the balance of the purchase money; &c.

MARCH,  
1818.  
Spindle's ad-  
ministratrix  
v.  
Miller's ex-  
ecutors.

The second Count stated, that the said *James Miller* in his lifetime, viz, on the                      day of                      in the year                      , caused to be made an accurate survey of the said land, whereby the quantity was ascertained to be                      acres, of which the defendant then and there had notice; that the said *James Miller* having departed this life before the execution of Deeds of Conveyance of the same to the said *Lewis Spindle*, leaving *Elizabeth* his widow, and his children *William Miller* and others, (named,) his heirs at law; they the said *Elizabeth*, *William*, &c., in pursuance of the said articles, caused to be prepared good and valid Deeds of Conveyance of the premises in the agreement mentioned, and on the                      day of                      at the County aforesaid, duly executed the said deeds, and then and there tendered the same unto him the said *Lewis Spindle*, and then and there required him to pay to the said *plaintiffs* the said sum of 600*l*, and to give his own bond &c. for the balance; yet the defendant &c.; charging the breach on his part, in like manner as in the first Count, and that he refused to accept the deeds so tendered.

The defendant pleaded, "Covenants not broken;" after which he died, and the suit was revived by *scire facias* against his administratrix.

A trial was had on the issue joined, and verdict found for the plaintiff for 1302*l*. damages, "that being the "principal sum due, with interest thereon from the 24th "day of September 1808, until paid;" which verdict was modified by consent of parties, so as to read as follows:—"We of the Jury find for the *plaintiffs* 702*l*.

(1) Note. So in the transcript of the record.

March,  
1818.  
Spindle's ad-  
ministratrix  
v.  
Miller's ex-  
ecutors.

" damages, that being the principal sum due with inter-  
" est thereon from the 24th day of September 1808, upon  
" the first Count of the declaration, if the Court shall  
" be of opinion that *Lewis Spindle*, under the contract  
" in the declaration mentioned, was bound to give his  
" own bond, or other bonds approved of, and assigned  
" by him, to *James Miller* for the balance of the purchase  
" money, after deducting 600*l.* part thereof, upon the as-  
" certaining the quantity of land, mentioned in the com-  
" tract, by an accurate survey of the same, of which the  
" said *Spindle* had notice, but disapproved, *without any*  
" conveyance for the said land ever having been made or  
" tendered by the said *Miller* to the said *Spindle*. And on  
" the second Count, we find for the plaintiffs 1302*l.*  
" damages, that being the principal sum due; and that  
" Interest is to commence thereon from the 24th day of  
" September 1808." And the parties agreed, that, if  
the Court should be of opinion that the action was sus-  
tainable under the *second* Count, judgment should be  
entered thereon for the plaintiffs according to the finding  
of the Jury; (saving to the defendant the benefit of cer-  
tain exceptions filed in the cause, in as full and ample a  
manner as if the foregoing modification of the verdict  
and agreement had not been made;) and judgment in  
that case be entered, on the *first* Count, for the defend-  
ant:—but if the Court should be of opinion that the  
plaintiff's action was not sustainable on the *second* Count,  
then judgment should be entered on the first Count, for  
the plaintiffs, or defendant, according to the opinion of  
the Court upon the above modified finding.

The Circuit Court was of opinion that the law was  
for the *defendant* on the *first* Count, and for the *plaintiffs*  
on the *second* Count. Judgment was therefore entered  
for 1302*l.* with interest thereon from the 24th day of Sep-  
tember 1808 'till paid, and Costs. From which Judg-  
ment the defendant appealed.

*Stanard* for the appellant,

*Green* for the appellee.

Judge ROANE pronounced the following opinion of  
this Court.

MARCH,  
1818.

Spindle's ad-  
ministratrix  
v.  
Miller's ex-  
ecutors.

The Court is of opinion that, upon the true construction of the agreement, as stated in the declaration, the testator of the appellees was bound to make or tender a conveyance for the land sold, whereupon he would be entitled to receive and recover the 600*l.* stipulated as the first payment therefor; and that, upon his also ascertaining the quantity of the land by a survey, he would have been farther entitled to the bonds stipulated to be given or assigned for the balance: but, it being found by the verdict, as modified by the consent of parties, that no such deed was ever made or tendered, the Court is of opinion that that balance is not due or recoverable, under the agreement, although a survey ascertaining the same has been made; and that the judgment of the Superior Court, upon the first Count, for the appellant, is correct.

The Court is further of opinion, that the said agreement provides, that the said conveyance should be made by the said testator *himself*, and not by his heirs; a restriction the appellant may have good reasons to insist on, and had, therefore, a right to insert in the contract; and that this construction is not varied by the circumstance that the penal part of the agreement extends to such heirs:—and the second Count in the declaration having admitted that no such conveyance was made or tendered, by the said testator, the Court is of opinion that the same makes no case whereon the appellees are entitled to recover, although it is stated therein, that Conveyances were made and tendered, for the premises, by the widow and heirs of the said testator.

The judgment of the Superior Court, on this Count, is therefore to be reversed, and entered for the appellant.



Decided  
March 11th;  
1818.

## Timberlake and wife against Graves.

1 A testa-  
rix be-  
queathed  
certain  
slaves "and  
their in-  
crease to  
her ne-  
phew J. A.  
to him and  
his heirs  
forever;  
but, in  
case he  
should die  
without  
heir, then  
and in that  
case, to be  
equally di-  
vided be-  
tween her  
two nieces,  
M. A.  
and P.

IN detinue, instituted by the appellants against the appellee, it appeared from a special verdict, that the plaintiffs *John Timberlake* and *Margaret* his wife, (late *Margaret Allen*,) and *Patsy Allen* an infant by *Garrett Minor* her guardian, claimed the slave in the declaration mentioned, under the following clause in the last Will of *Nancy Woolfolk* deceased; viz; "I give unto my beloved nephew *John Allen*, the following negroes, to wit;" (inserting their names;) "*them and their increase* to him and his heirs forever; but, in case it should please God, for him to die without heir, then and in that case, it is my wish what I have given him, to be equally divided between my two nieces *Margaret Allen* and *Patsy Allen*;" and that the defendant *Graves* was in possession of and claimed the said slave by purchase from *John Allen*, the first devisee, who died without issue before the institution of the suit.

*A.* "This was adjudged a good limitation over, upon *J. A.*'s dying without issue at the time of his death, to *M. A.* and *P. A.* who survived him; on the ground, that the devise over to the nieces was, to *them* merely, and not to *them and their heirs*; purporting therefore a personal benefit to *themselves*; which construction was fortified by the words "*then and in that case*," and "*equally to be divided*," found in the bequest. (See *Royall v. Eppes*, 2 *Munf.* 479; *Dunn and wife v. Bray*, 1 *Call* 338; *Higgenbotham v. Rucker*, 2 *Call* 313; and *Selden v. King*, 2 *Call* 72; cases in which the limitations over took effect.(1.)

(1.) Note.—In *Hunters v. Haynes*, 1 *Wash.* 71; *Hill v. Burrow*, 3 *Call*, 348; *Eldridge v. Fisher*, 1 *H. & M.* 559; *Sydnor v. Sydnors*, 2 *Munf.* 263; *Williamson v. Ledbetter*, 2 *Munf.* 521; and *Allen v. Parham*, 5 *Munf.* 457, (all of which were cases of devises of lands,) the limitations over were, in each instance, to the person in remainder, "*and his heirs forever*." In *Tate v. Tally*, 3 *Call* 354, *Jesse Tate* "the first devisee would have had only an estate for *life*, unless he had taken an estate tail," (see the opinion of Judge *Lyon*, *Ibid* 361,) and therefore, it seems, the limitation over to *John Tate*, tho' made without the words "*to him and his heirs*," could not take effect; because, to effectuate the testator's intention in favour of the first devisee, there being no words of perpetuity added to the devise to him, and the Will bearing date in 1777, it was decided that he took an estate tail, and that estate was converted into a fee simple by the Act of Assembly.

Upon this verdict, the Circuit Court entered judgment for the defendant, whereupon the plaintiffs appealed.

*Wirt and Leigh* for the appellants.

*Wickham* for the appellee.

MARCH,  
1818.

Timberlake  
and wife

v.

Graves.

March 11th, 1818, Judge ROANE pronounced the Court's opinion that the Judgment be reversed, and entered for the ~~defendants~~<sup>plaintiffs</sup>; for which he assigned the following reasons.

The ground on which the opinion of the Court is founded, is, that the devise over to the nieces is to *them* merely, and *not to them and their heirs*. It purports a limitation to *themselves*, and was intended as a *personal* benefit to *them*. This construction is fortified by the words, "*then and in that case,*" and "*equally to be divided,*" found in the bequest; which, although, singly taken, they might not be complete to limit the previous words, have that effect in conjunction with the circumstance above mentioned.

The Court has considered the authorities referred to, and is of opinion that none of them conflict with or overrule this construction.

Decided  
March 13th,  
1818.

## Williamson and others against Bowie and others.

ON the 9th of December 1799, *Washington Bowie*, a Citizen and resident of the State of *Maryland*, sued out of the Clerk's office of *Fairfax County* in *Virginia*, a Writ of Subpœna and Attachment in Chancery against *William B. Magruder* and *Thomas L. Washington*, Merchants and partners trading under the firm and style of *William B. Magruder & Co.*, (both of whom were inhabitants of *Maryland*,) and *William H. Washington* and *John Luke* residents of the said County of *Fairfax*, defendants; which writ was endorsed, "to stop the debts and effects of the absent defendants in the hands of the defendants *William H. Washington* and *John Luke*, to satisfy a debt due from them to the plaintiff." The Sheriff's return was, "Executed on *John Luke*, December 9th, 1799." "Executed on *William H. Washington* 18th January 1800 :—the others not found."

On the 21st of December 1799, a Deed of assignment was executed by *William B. Magruder* and *Thomas L. Washington* to *David Williamson* and others, trustees on behalf of themselves and others creditors of the said *Magruder* and *Washington*; purporting to convey and transfer to the said trustees, for certain uses and purposes therein mentioned, "all and singular the goods, wares, merchandize, sea vessels of every kind, either in ports or at sea, with their tackle, apparel and furniture, with the cargoes to them respectively belonging, and all monies due from them to the absent defendants, and to inhibit a transfer thereof from the said absent defendants to other persons."

1. Damages ought not to be given upon the affirmation of a decree dismissing a bill with costs; such decree not being rendered, "for any sum of money or quantity of tobacco," except the costs. ¶ See Acts of 1803, c. 116, Edition of 1808, c. 29, s. 2, p. 29; R. Code of 1819, c. 66, s. 59, p. 208.

3. An attachment in Chancery lies to secure a debt payable at a subsequent day, or to relieve the indorser of a note which has not become payable at the date of such attachment, which binds the property in the hands of the garnishee from the time of its service, so as to inhibit the absent defendant's making a transfer thereof, even for the benefit of a creditor whose claim is already due and payable.

4. A Creditor residing in *Maryland*, may sue out an attachment in Chancery in *Virginia*, against his debtor, residing also in *Maryland*, and others residing in *Virginia*, indebted to, or having in their hands effects of, such debtor. ¶ The parties stood in the same situation, as to residence, in *McKim v. Fulton M. S.*

“ *debts, sum and sums of money, due, owing and belonging to the said William B. Magruder and Thomas L. Washington, and all their property whatsoever of every kind, which belongs to them in partnership, and all securities had, made or obtained for the same, whether by bond, bill, note or in any other manner whatsoever, together with all Books of Accounts of the said partnership, and necessary papers and vouchers relating to the same, and all the right, title, interest, claim and demand whatsoever, of them the said William B. Magruder and Thomas L. Washington, and each of them, of, in and to the same, and to every part thereof.*” This deed was executed by the trustees, also, but not by any of the creditors, and was recorded in Baltimore county Court, Maryland.

MARCH  
1818.

Williamson  
and others,  
v.  
Bowie and  
others

It appeared by the Bill and Exhibits filed by the plaintiff *Bowie*, that part of his claim against *William B. Magruder & Co.* was founded on negotiable notes endorsed by him for them before the date of the said subpoena and attachment, but payable afterwards; viz, on the 13th of December 1799, and the 1st of January 1800; and that the residue of the said claim was for cash previously paid, at the Bank of Columbia, on their account.

The suit having abated as to the defendant *William H. Washington* by his death; and orders having been duly published against the absent defendants; after some other proceedings, a final decree was entered on the 20th of February 1805, in favor of *Walter Smith* and *Charles Weyman* assignees of the plaintiff (who *pendente lite* had become a bankrupt,) against the said absent defendants, for the principal and interest appearing due to him, and the costs of suit; and the other defendant *John Luke* having by his answer confessed that he was indebted to the said absent defendants in a certain sum of money secured by a mortgage, on which a decree of foreclosure and sale of the mortgaged premises had been obtained, but not executed, in a suit instituted by the said *Wm. B. Magruder & Co.* for that purpose, in the same County Court, it was farther decreed and ordered that the said *Smith* and *Weyman* assignees of the plaintiff *Washington Bowie* should

MARCH  
1818.

Williamson  
and others  
v.  
Bowie and  
others.

have the benefit of the said decree of foreclosure and sale, and receive the money raised thereby.

On the 23d of November 1803, (before which day an interlocutory decree had been pronounced in favour of *Bowie*, nearly to the same effect with the final decree last mentioned,) *David Williamson and others* filed their Bill in the same county Court, setting forth their claim to the said mortgage by virtue of the Deed of Trust, which they contended was entitled to preference to *Bowie's* claim, on the grounds chiefly, that he, as well as the said *William B. Magruder* and *Thomas L. Washington*, being citizens of, and residents in, *Maryland*, he ought not to be permitted to institute an attachment in Chancery in *Virginia* against them, for a claim which also had its origin in *Maryland*, and that the whole of *William B. Magruder & Co's.* property was transferred by the Deed of Trust, for the purposes therein expressed, before any claim was actually due to him from the said *William B. Magruder & Co.* and also prior to the filing of the Bill by the said *Bowie* in the aforesaid suit. They said also that the suit should have abated by the plaintiff's becoming a bankrupt during it's progress.(1.) They prayed therefore, that the interlocutory decree before mentioned be set aside as erroneous; and that the benefit of the decree of foreclosure and sale of the property mortgaged by the defendant *John Luke* be vested in them the said trustees; making the said *William B. Magruder* and *Thomas L. Washington*, and the assignees of *Bowie*, (in consequence of his bankruptcy) as well as himself, defendants to their Bill.

The defendant *Bowie* by his answer, insisted, that the same principle of justice, which declares a creditor whose debt is due and payable may secure it by way of attachment, will support an attachment the object of

(1) Note. In opposition to this objection, Mr. *Wickham* said, the uniform practice in the Federal Courts, has been for the suit not to abate by the plaintiff's becoming a bankrupt, but to go on for the benefit of his assignees. This practice (he observed,) is sanctioned by the express words of the Act of Congress. But, if it were not so the bankruptcy could not be relied on unless it were pleaded in abatement *visi darrein continuance*: such objection can not be taken by a third person.

which is to secure a debt payable at a subsequent day; (2) and averred that the notes, endorsed by him for *William B. Magruder & Co.* which were not yet payable, on the 9th of December 1799, when he obtained the attachment, were afterwards paid, when they became due, by himself, and by a certain *W. C. Smith* on his account.—He admitted that, at the time the attachment was issued, both himself and the said *William B. Magruder & Co.* resided in the state of Maryland; but he contended that the law of Virginia concerning absent debtors, made no difference among creditors and debtors, but put them all on the same footing without regard to the particular place of their residence; and, if it did not, the Constitution of the United States did.—He neither admitted nor denied that the Complainants were trustees as they alledged, but prayed the Court to require them to prove, by competent testimony, their trustee-ship.

MARCH  
1818.

Williamson  
and others  
v.  
Bowie and  
others.

The defendants *Smith* and *Weyman* assignees of *Bowie*, relied on his answer, being, in other respects, ignorant of the matters set forth in the Bill.

The County Court, on hearing the Bill, *Answers*, (to which there was no Replication,) and Exhibits, (the cause being set for hearing as to *Bowie* and his assignees,) dismissed the Bill with Costs, on the 20th of February 1805; and that decree was affirmed, in October following, by Chancellor *Wythe*, who adjudged, also, “that the appellants pay to the appellees damages according to law for retarding the execution of the said decree, together with the costs by them expended, in defending the appeal.”

From this decree the Complainants appealed to this Court.

*Nicholas* for the appellants.

*Call* and *Wickham* for the appellees.

March 13th 1818, Judge *Roane* pronounced the Court's opinion, as follows:

The Court, not deciding, as a general proposition, what is to be considered, in this Country, a *lis pendens*,

(2.) Note. It was said in argument, that, in *McKim v. Fulton*, \**11. Call 106* (M. S.) the attachment in Chancery was in the nature of a Bill *quia timet*, for relief on a future and contingent event; nothing being due at the time; and it was supported by the Court.

MARCH  
1818.

Williamson  
and others.

Bowie and  
others.

binding on purchasers without actual notice, yet, considering this case by analogy to attachments against absconding debtors, whose credits as well as effects may be arrested, and alienations thereof prevented; and being of opinion that the Subpœna, with the indorsement thereon, operated, agreeably to the practice in this State, to stop the payment by the Garnishee of the monies due from him to the other defendants *Magruder & Co.*, and to inhibit a transfer thereof, from them to others, from the time of the service of that process on him, and that service having taken place before the conveyance in this case,—is further of opinion that the proceedings in the suit instituted by *Bowie*, in the Bill mentioned, gave that creditor a preference over the claim of the appellants.

On this ground, (and *without deciding upon the validity of the Conveyance aforesaid,*) (3) the Court is of opinion that the Decree of the Chancellor, so far as it affirms that of the County Court is correct; but that that decree is erroneous in giving damages against the appellants. The said Decree is therefore reversed with costs, and the cause remanded, with directions to the Court of Chancery to affirm the decree of the County Court.

(3.) Note. The deed of trust was objected to in argument, on several grounds; 1. as *fraudulent*, and therefore void, because, by its terms, the partnership effects were to be applied to pay *private* debts of *Magruder*, as well as debts of the Company: and 2. as *not having been recorded in Virginia*, without which it could not convey *real estate here*, so as to bar a creditor. It was contended by Mr *Nicholas*, that a mortgage of land is considered in a Court of Equity as *personal estate*: but it was said on the other side, that this rule applies only between the Executor and Heir; that all assignments under seal, of such mortgages, pass the land itself, and therefore must be recorded.

Decided  
OCTOBER 15,  
1818.

## Rucker against Harrison.

A motion was made by Josiah Harrison, to the County Court of Amherst, in May 1810, for award of execution against *Joseph Brock* and *Isaac Rucker*, upon a forthcoming bond dated May 21st 1803.

The original return made upon the said bond, was as follows :—"The within bond was forfeited on the 4th of July 1803. *James C. Moorman D. S.* for *William Scott, Sheriff.*" On the motion of the said *James C. Moorman D. S.* or *William Scott* late Sheriff of Campbell county, he was, on the day of the motion upon the Bond, permitted to alter his return theretofore made on the Execution and forthcoming bond; which return, on the Bond aforesaid, as amended, was in the following words and figures, to wit :—"To the within judgment, a *Supersedeas* issued from the District Court of Charlottesville, dated the 1st of July 1803, which writ of *Supersedeas* the Sheriff thinks was delivered to him on the day of sale. The property within named was not delivered at the day and place of sale." *James C. Moorman D. S.* for *William Scott Sheriff Campbell County.*"

The County Court overruled the motion, and entered judgment that the defendant *Rucker* (as to whom alone the notice was proved,) should recover costs against the plaintiff.

On an appeal to the Superior Court, this judgment was reversed, and judgment was given against *Rucker*, who then obtained a *Supersedeas* from this Court.

*Wickham* for the plaintiff in error, contended, on the authority of the case of *Wilson v. Stevenson*, 2 Call 213, that the penalty of the forthcoming bond was saved by the *Supersedeas*. This indeed is a stronger case than that :—for it might have been contended that a Court of

ought to that appointed for the sale of the property taken in execution; that he thinks the said Writ was delivered to him on the day of sale; and that the property for which a forthcoming bond was given, was not delivered at the day and place of sale; is sufficiently precise and certain.

4. In this case, the Sheriff was permitted by the Court to amend his return, after a lapse of seven years from its date.

1. If a *Supersedeas* to a Judgment, (execution being levied, and a forthcoming bond taken,) be issued before the day of sale; and thereupon the property be not forthcoming; the penalty of the bond is saved, and no motion lies upon it.

2. It seems, too, that, if the property taken in execution be in the Sheriff's hands, at the time of his receiving the *Supersedeas*, or be delivered to him, on the day of sale, after his receiving such Writ, he ought to restore it to the owner.

3. An amended return, by a Sheriff, upon an execution, stating that a Writ of *Supersedeas* was issued on a day specified; being a day previ-



OCTOBER,  
1818.

Bucker  
v.  
Harrison.

law was not bound to take notice of an *Injunction* from a Court of Equity; but here the Writ of *Supersedeas* is a common law remedy, in the face of which the Sheriff could not proceed without a contempt of the Court.

*Stanard contra*, insisted, 1st, that the forthcoming bond must be regarded as forfeited, according to the only return of which the Court can take notice. After such a lapse of time, the Sheriff could not be permitted to amend his return, especially from a recollection confessedly imperfect (1.) No return, whether original or amended, ought to be accepted unless it be *precise and certain*. (a) But the only positive part of this amended return, is that which says that the property was not delivered.

(a) *Dal-*  
*son's Sheriff*,  
163-168.

2dly, The facts that the *Supersedeas* was awarded and emanated before the day of sale, do not appear by evidence of which the Court can take judicial notice. If these facts existed, they were of record, and were proveable only by the record.

3dly, The emanation of a *Supersedeas* to a Judgment after the levying of an Execution thereupon, does not supersede the farther proceeding upon the execution, in relation to the property taken by the Sheriff.

The principle determined in the case of *Wilson v. Stevenson*, 2 Gall 213, is that, if a forthcoming bond be not forfeited when an injunction issues, the penalty is saved, because compliance with the condition would be useless, since the property, immediately upon it's being delivered to the Sheriff, must be restored to the defendant. This proposition, that the property must be restored, is drawn from the case of *Ross v. Poythress*, 1 Wash. 120. In that case, the Court, adverting to the position of Counsel, that, under the law of England, an injunction would not authorise the restoration of goods on which execution had been levied, but would stay them in the Sheriff's

(b) 2 Har. hands, (b) says, "we give no positive opinion as to the effect of an injunction obtained upon an execution against the goods and chattels, after seizure; as that"

Ch. Pr. 225,  
*Wyatt's*  
Regr. 237.

(1.) Note *Sec Bullie's executors v. Winstons*, 1 Munf. 269.

"case is not before us:—probably it would be considered as settled by the Act of 1791, which, directing a restitution of the money levied, would seem to include inferior cases, and to extend, by an equitable construction, to the restitution of goods seized in execution, and not sold." The decision therefore rests solely on the equitable construction of the *Act of Assembly*, and not on the common law. But that Act applies to the case of an *Injunction*; saying nothing of a *Supersedeas*.

Let it be conceded, that, if the effect of a *Supersedeas* be to restore the property to the defendant, the principle in *Wilson v. Stevenson* will cover this case: the question then is, does a *Supersedeas* entitle the party suing it out to a restoration of the property actually in execution?

There is no statutory provision on the subject:—it consequently is a question of common law:—and, by a series of decisions ever since the year books, it has been settled, that an Execution is an *entire* thing, which, being once *begun*, (*that is levied*,) can not be *stopped* or *superseded*.(c)

*Wickham* in reply. No exception was taken to the act of the Court in giving the Sheriff leave to amend his return. The circumstances do not appear which induced the Court to give that leave. It therefore must be presumed to be right, since nothing appears to the contrary.

If any argument can be drawn from the *delay*, it was chargeable to the plaintiff himself, who let seven years elapse before he moved on the bond. If the return was uncertain, let him go against the Sheriff for making an insufficient return. But the return is *positive*, that the *Supersedeas* was issued before the day of sale. The Sheriff says he *thinks* it was delivered to himself on that day.

As to the point of law concerning the effect of the *Supersedeas*, the practice of the Courts in this Country is to be relied upon. In *Moss v. Moss's administrator*, 4 H. & M. 297—8, *Mr. Mansford*, in argument, relied on the English practice to shew, that judgment could not be against "part of the obligors in a joint bond (the others

OCTOBER,  
1818.

Rucker  
v.  
Harrison.

(c) Case 2  
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Edw. 3. fo-  
lio 27; *Mil-*  
*ton v. Eld-*  
*rington*, 1  
*Dyer*, 98 b;  
*Charter v.*  
*Pete*; *Croke*,  
*Eliz.* 597;  
*Moor* 542;  
*Feltv.* 6;  
*Langston v.*  
*Grunt*, Comb.  
389; 2 *Ld.*  
*Raym.* 989;  
1 *Salk.* 147;  
*Ibid* 323; 1  
*Ventr.* 255;  
*Meriton v.*  
*Steven*,  
*Willes*  
271; 4 *Term*  
*Rep.* 411.

OCTOBER,  
1818.

Rucker  
v.  
Harrison.

(d) 4 H.  
Es M. 293.  
Note.

"being alive,) until further process (*even to outlawry*) "had been taken out against the others who failed to "appear:" but the practice of this Country, being different, prevailed.(d) There is no such thing in England, as a forthcoming bond. I am certain it is the established practice of this Court to grant the *Supersedas*, even when informed that Execution was levied; and the Sheriff thereupon, if the property is in his possession, restores it to the defendant..

October 15th 1818, the Court reversed the judgment of the Superior Court, and affirmed that of the County Court.

Decided,  
Oct. 16th.  
1818.

### Cocke administrator of Bromley against Harrison.

1. A suit in Chancery properly lies, against a defendant, who, claiming title under a deed alleged to be fraudulent, hath taken possession of and converted to his own use sundry articles of personal property; the plaintiff praying the Court to set aside such fraudulent deed, and compel the defendant to render a just account of the property so wrongfully taken, and to pay the value thereof to the plaintiff.

THIS was a suit in the Superior Court of Chancery for the Richmond District, brought by *Thomas Cocke* Sheriff of Prince George County, to whom administration of the estate of *James Bromley* deceased was committed, against *Obadiah R. Harrison*.

The Bill charged the defendant with having unlawfully taken possession of the personal property of the deceased, after his death, and before the plaintiff qualified as administrator, and selling the same under the pretence of satisfying a deed of mortgage, charged by the plaintiff to have been fraudulently executed; who therefore prayed the Court to set aside the said deed, and compel the defendant to render a just account of the property so wrongfully taken into his possession, and to pay to the plaintiff the full value thereof.

The defendant by his answer denied the fraud; averring that the Deed was fairly obtained as a security for a just debt, and set forth a list of the articles of property.

and to pay the value thereof to the plaintiff.

Sundry depositions and exhibits were filed, partly tending to fix on the defendant the charge of fraud, and partly leading to his exculpation; but *no account* was directed, or taken.

OCTOBER,  
1818.

Cocke administrator  
of Bromley  
v.  
Harrison.

Chancellor TAYLOR dismissed the Bill with Costs, "being of opinion that the demand of the plaintiff presented a *plain action of trover and conversion*."

BY THIS COURT, the decree was reversed, and the cause remanded in order to be matured, and tried on it's merits.

## Noland against Seekright lessee of Cromwell.

Decided,  
Oct. 16th,  
1818.

AFTER a judgment in Ejectment in favour of Seekrightlessee of *Margaret Cromwell* against *Thomas Noland*, the following order was made by the Superior Court of Frederick County, *on the 4th of October 1814*; viz, "On the motion of the plaintiff by his Counsel, and it appearing to the Court, by the Record, that *this case terminated in favour of the plaintiff in the late District Court held at Winchester*; and it farther appearing to the Court, that the defendant obtained an Injunction to stay proceedings on said Judgment; that said case has been many years pending in the Court of Equity, and in the Court of Appeals; that both said Courts decided in favour of the said plaintiff; and that, without a rule to shew cause, a Rule is granted the plaintiff upon the defendant to shew cause on Friday next, (the 5th day of the present term,) why the term in said lease mentioned should not be en-

1. Upon a judgment in Ejectment, if execution of the Writ of *habere facias possessionem* be prevented for several years by Injunction, the plaintiff is entitled to the Writ on motion upon a rule to shew cause, without a *scire facias*, provided not more than a year has elapsed since the affirmation, by the Court of Appeals, of the Decree dissolving the Injunction.

tion and dismissing the Bill in Chancery.

2 In such case, if the term laid in the declaration has expired pending the proceedings on the Injunction, the Court to which the motion is made for the Writ of *habere facias possessionem*, may cause the term to be enlarged and award the Writ, upon a rule to shew cause, served upon the defendant.

OCTOBER,  
1818.

Noland

v.  
Seekriant  
lessee of  
Cromwell.

“larged, and the Commonwealth’s Writ of *habere facias possessionem* awarded the plaintiff, to cause him to have possession of his term, so to be enlarged, in the premises in the said lease mentioned.”

The Rule being served, (in proof of which an affidavit was filed,) was afterwards enlarged from time to time, for reasons appearing to the Court, until the 9th of May 1815, when it was made absolute; leave was granted to enlarge the demise laid in the declaration, by inserting the word *thirty*, in the place of *twenty*, in the said declaration, so as to make the term of the demise *thirty one*, instead of *twenty one* years; and a Writ of *habere facias possessionem* was awarded, to cause the plaintiff to have possession of his term so enlarged.

To this Order the defendant obtained a Writ of *Superedeas* from a Judge of this Court; stating in his Petition the following reasons; 1st, because the said Superior Court had no power after judgment to alter the Record, even if the Judgment had been entered in that Court; there being no clerical mistake, or any thing which should bring the case within the operation of the Acts of Jeofails:—2d, that, if even the Court had power to permit such alteration after judgment in the *same* Court, there was no such power when the judgment had been obtained in *another* Court: and 3d, because, as more than a year elapsed from the judgment, (the District Courts having ceased to exist much more than a year before the said Rule was obtained,) no writ of possession could be sued out without a *scire facias* first issuing.

*Wickham* for the plaintiff in error.

*Stanard contra.* The doctrine that a Court of law will not take notice of an Injunction has been exploded in England. Here the execution of the Writ of *habere facias possessionem* was intercepted by Injunction, and twelve months did not elapse, from the time when the party was at liberty to take out the Writ, before it was actually taken out. (1)

(1) The Court of Appeals affirmed, in January 1814, the decree dissolving the Injunction and dismissing the Bill. See 4 *Munf.* 157.

**Wickham** admitted that where the party is delayed by Injunction, he is not put to his *scire facias*. (2)

OCTOBER,  
1818.

Noland  
v.  
Seekright  
lessee of  
Cromwell.

**Stanard**, to shew the right of the Court to enlarge the term, cited *Hunter v. Fairfax's devisee*, 1 *Munf.* 218—238, and *Vicars v. Haydon, Cowp.* 841; in both which cases, the appellate Court itself changed the record by enlarging the term. The demise in Ejectment is merely fictitious:—it is a remedy invented to try the title; is under the control of the Court, and may be modelled so as to accomplish the purposes of justice. (a)

(a) 3 *Burr.*  
1295.

October 16th, 1818, the Court affirmed the Order in question.

(2) Note. See argument in *Gray's admr. v. Berryman*, 4 *Munf.* 183—4.

## Greshams against Gresham and others.

Decided,  
Oct. 16th,  
1818.

**TALIAFERRO CARLTON**, by his last Will, dated July 9th, and admitted to probate December 12th, 1803, (after several bequests to other persons,) devised as follows: "Then the balance of my estate I give to my brother *Isaac*; in case he dies without issue, to be equally divided between my uncle *John Gresham's* children; to wit;" here inserting their names, *without adding any words of perpetuity*.

1. A testator, in the year 1803, devised the residue of his estate to his brother *Isaac*; in case he died without issue, to be equally divided between his uncle's children; (naming them;) *without adding any words of perpetuity* This limitation over was good, and took effect, upon the death of *Isaac* without issue at the time of his death.

*Isaac Carlton* (who died without issue, in October 1806,) by his Will, bequeathed several slaves which he held under the first mentioned Will, to *Anthony Gresham* and others, who thereupon brought suit for them, in Chancery, against *John Gresham* administrator of *Taliaferro Carlton*, and *Benoni Gresham* and others his children, who defended the suit by him as their father and guardian.

Chancellor **TAYLOR** was of opinion that the limitation over, after the devise to *Isaac Carlton*, in the Will of *Taliaferro Carlton*, was void, "being after an indefinite failure of issue." He therefore decreed according to

October,  
1818.

the prayer of the Bill: from which decree the defendants appealed.

Greshams  
v.

*Wickham* for the appellants.

Greshams and  
others.

*Stanard* for the appellee.

October 16th 1818, Judge ROANE pronounced the Court's opinion, that the Decree be reversed, and the bill dismissed, on the authority of the case of *Timberlake v. Graves*, and other cases in this Court. See *Angell* 174. *12th. 301, + 456; Didlake v. Horner Gilm. 194.*

Decided,  
Oct. 19th,  
1818.

## Fleet against Hawkins.

1. Though a purchaser of a tract of land agree to pay so much by the acre, yet if he also agree to take it by the Patent, or survey already made, as fixing the number of acres in the tract, (without any fraud, concealment, or misrepresentation, on the part of the vendor,) he thereby takes upon himself the risk as to quantity; by which he might be gainer or loser; and therefore is not entitled to any compensation for a deficiency.

See  
*Jelliffe v. Hite*, 1 Call  
329; *Hull v. Cunningham's ex'or.* 1 Munf. 336.

ON the 5th of October 1807, *Fleet* agreed to sell *Hawkins* a tract of land, supposed to contain three hundred and seventy acres, at fifteen dollars per acre, and put him in possession, according to contract, about the end of the same year. The land was held, partly, under a Patent for 352 acres; the residue was a small tract, purchased of one *Hoffman*, which afterwards was surveyed and found to contain upwards of nineteen acres.

In pursuance of this agreement, a conveyance was made on the 8th of August 1808, stating the contents to be (as mentioned in the Patent and Survey of the small tract,) three hundred and seventy two acres "more or less;" and, on the 12th of September in the same year, *Hawkins*, referring to the said conveyance, mortgaged the land to *Fleet* for payment of the purchase money. He afterwards paid it off without objection; but, in the year 1811, filed a bill in the Superior Court of Chancery for the Williamsburg District, to recover compensation for an alledged deficiency in the number of acres; stating that *Fleet* had defrauded him, by saying it was unnecessary to survey the larger tract, as it had been already surveyed; though he (*Fleet*) knew it did not contain the quantity called for; that the Deed containing the words "more or less" was executed by *Fleet*, and never seen by him (*Hawkins*), until after it was record-

ed. He therefore prayed that a part of the purchase money be refunded. The bill stated also a fraud, in not sowing wheat, delivering fodder, &c.

The answer denied all fraud, and averred that the respondent held the larger tract by Patent for upwards of 352 acres; that, at the date of the contract, he offered the plaintiff his election to take it according to the survey referred to in the Patent, or to have it surveyed; and the plaintiff chose to take it according to the Patent; believing, as he said, that he should be a gainer thereby.

Sundry depositions were taken, proving that *Hawkins made his election, at the time of the contract, to take the larger tract by the old survey*; that he was privy to the execution of *Fleet's* deed to him, and accepted it without any objection. There was no proof of any fraud, concealment, or misrepresentation, on the part of the defendant.

A survey was made by the Court's order, and returned; according to which, the whole tract contained *only three hundred and thirty eight acres*.

The cause being removed to the Court of Chancery holden in Richmond, Chancellor TAYLOR, on the 26th of January 1815, decreed as follows. "The Court, acquitting the defendant of any intention to perpetrate a fraud on the plaintiff, in the contract which is the subject of controversy, but being nevertheless of opinion that the sale of land made in this case by the defendant to the plaintiff, was a sale *by the acre, and not a sale in gross*, and that, consequently, if the defendant hath received of the plaintiff payment for a greater number of acres than he did in fact convey to him, he holds so much money of the plaintiff's, which the defendant ought in equity and good conscience to refund; and it appearing, by a comparison of the deeds with the report of the survey made in this cause, that the lands so sold by the defendant to the plaintiff do in fact fall short of the estimated quantity by thirty four acres, for which the defendant by his answer acknowledges himself to have received payment according to the terms of the mortgage exhibited in the

OCCURRING,  
1818.

*Fleet*  
v.  
*Hawkins*.



OCTOBER,  
1818



Fleet  
v.  
Hawkins.

“ cause; that is to say, on or before the 1st of January  
“ 1810, the day of payment of the last instalment; doth  
“ accordingly adjudge, order and decree, that the de-  
“ fendant pay to the plaintiff five hundred and ten dol-  
“ lars, with interest thereon from the said 1st of Jan-  
“ uary 1810, 'till payment, together with the costs of  
“ this suit; and that the Bill, so far as it seeks other  
“ relief from the defendant, be dismissed.” From which  
decree, the defendant appealed.

*Wickham* for the appellant.

*Upshur* and *Stanard* for the appellee.

This Court's opinion was delivered by Judge ROANE,  
as follows.

The Court is of opinion that, altho' the original proposition for the sale of the land in question, was one of a sale by the acre, at the rate of \$15 for each acre contained in the two tracts proposed to be sold, the contract assumed a different character as to the *larger* tract, by the agreement of the parties to refer to the patent as fixing the quantity therein contained. By this agreement, the right to survey that tract was renounced by the appellee; and, as to it, it became a contract of hazard, by which he might have gained. That agreement is express to pay for that tract, as much money as would result from multiplying the number of acres mentioned in the patent by the price per acre originally proposed to be given; and is not different from one in which the sum had been actually extended, and in terms promised to be paid. It was entirely competent to the appellee to waive another survey, and abide by the one already made; and it is a risque by which it is proved he expected to gain. On the part of the appellant, his conduct was entirely fair. He represented nothing but what he believed to be true, and which he had good grounds for so believing; and he fairly exhibited to the appellee his survey and patent, as the grounds and foundation of his belief, as to the number of acres contained in the larger tract. With a full knowledge of all the circumstances, and as much knowledge, as to the quantity, as the appellant himself is shewn to have had, the appellee entered into the contract; and

his own construction thereof is evinced to have corresponded with our's, by his agreeing, in the deed, accepted more than ten months thereafter, to pay the gross sum resulting as aforesaid.

On these grounds the Decree is to be reversed, with Costs, and the bill dismissed.

OCTOBER,  
1818.

Fleet  
v.  
Hawkins.

## Givens and Reynolds against Manns.

Decided,  
Oct. 23d  
1818.

MILLY MANN and others brought suit in August 1815, against Joseph Givens and Magdalen Reynolds, in Boteston, who has had possession of slaves more than five years, before the date of a deed of emancipation from another who previously was their owner, has a right, in opposition to their suit for freedom, to prove by the acknowledgment of such owner, made before execution of the deed, or by any other legal evidence, that such possession of his was adverse to the claim of such owner; but not by any such acknowledgment made thereafter.

2. If a proprietor of slaves deliver them to another, who thereupon claims them, as sold; any declarations made by the former, after such delivery of possession, and not in presence of the latter, are not admissible as evidence in opposition to such claim.

3. Qu? Whether a deed of emancipation from a person having the right to slaves, of which another has adverse possession at the time, be competent to confer a right to freedom?

4. A deed of emancipation can have no effect, if made by a person out of possession; another holding the slaves by a title adverse to his; and the possession of such other person having continued for five years before the execution of such deed.

5. A deed of emancipation recorded in a District Court, is not so authenticated as to be lawful evidence in a suit for freedom. (See Acts of May 1782 c. 21. § 1.; 1792, edi. 1794, 1803 and '14, c. 103. § 6; R. Code of 1819, c. 111. § 53, vol. 1st, p. 433.)

6. A Bill of sale of personal property, (not being necessary to pass the title,) need not be shewn in evidence by persons claiming under the grantee, in a controversy between them and the grantor, or those claiming under him; for they may prove, by any other legal evidence, a title in the person under whom they claim; and such grantee, or his representatives, may prove their title by other evidence than the Bill of sale, unless it be alleged that such Bill of sale contains other matter than the mere transfer of the property, (and of which the grantor, or those claiming under him might avail themselves,) and notice be given to produce it: but in neither case can the substance or contents of the Bill of sale be given in evidence, without due affidavit by the party, or other satisfactory proof, of it's loss, or that it is not in the power of the party so offering the evidence.

7. It seems, that a deposition taken de bene esse, by two magistrates, and with due notice, (it appearing that an order of Court was made awarding a Commission to take it, and that the Clerk charged a fee for issuing the commission,) may be read in evidence, on proof of inability of the Witness to attend; notwithstanding there be no other proof that it was taken by virtue of a Commission delivered to the magistrates; (no Commission being found among the papers;) and it be returned to the Clerk's Office, open and unsealed, but without being shewn to have been erased or altered.

OCTOBER,  
1818.

Givens and  
Reynolds  
v.  
Manns.

tourt County Court, *in forma pauperis*, to recover freedom; and issue was joined on the question of freedom or slavery.

At the trial, (which took place in November 1817,) the plaintiffs introduced a Deed of Emancipation from *Thomas Reynolds* in their favour, dated October 18th 1797, and recorded, in the *District Court, holden at the Sweet Springs*, on the 19th of the same month. It was admitted by the parties, that the said *Thomas Reynolds* was once the owner of the slaves in the said paper mentioned, of whom the plaintiffs constituted a part; but the defendants contended that, long before the date of the said paper, he had sold them to his son *John*; and, in proof thereof, they adduced the parol evidence of three witnesses:—1. *Daniel Givens* stated that the plaintiff *Milly* at the time of the birth of her first child (*Isaac*, stated in the said paper as being ten years of age,) was in the possession of the said *John*, as were also the other slaves mentioned in the said paper; that, about one or two years afterwards, the said *Thomas* told the witness, several times, that he had sold the said slaves to his said son *John*, and had made him a bill of sale for them; and *John* and those claiming under him remained in possession thereof 'till *John's* death, which happened about the year 1814. 2. *Amy Handly* testified that, some years ago, (the number she could not recollect,) the said *Thomas* came to her house, and, in conversation, in which he manifested some dissatisfaction towards his son *John*, with whom he resided, said it was true that he had sold him the said slaves, and executed a Bill of Sale to him for them; and that the said *John* had executed a Bond for 200*l.*, as the price for them; but that he had lost the bond, and *John* had lost the Bill of Sale; by which the witness believed he meant "*John had it not now.*" The Witness, though a neighbour, did not recollect to have heard, at the time of that conversation, of a deed of Emancipation or other disposition of said slaves by *Thomas Reynolds*. 3. *George Hancock* testified that, some years ago, *John Reynolds* consulted him as Counsel, on the effect of a bill of sale (which he shewed him) of slaves from his father to him; viz. whether his father could (as he intended)

OCTOBER,  
1818.

Givens and  
Reynolds  
v  
Mann.

make any other disposition or alienation of them; and the Witness, being informed by *John* that he had been in possession of the slaves some years, advised him that his father could not make another disposition of them. The plaintiffs objected to any other evidence being given to prove the sale from *Thomas* to *John*, without producing the said Bill of Sale, or proving it's existence, and it's loss, and the manner of it, by satisfactory evidence; and, though the defendants offered to prove the sale by parol evidence of the same, and the payment of the consideration contracted to be paid, the Court sustained the objection; whereupon the defendants filed a bill of exceptions.

The defendants also offered in evidence the deposition of *John Caldwell sen.*, taken *de bene esse*, by virtue of an order of Court, and written notice to *Moses F. Cook* Attorney for the plaintiffs, and proved the inability of the witness to attend at the trial. The plaintiffs objected to the reading thereof, because no commission appeared among the papers; (though it appeared from the Clerk's fee-book that one had been charged to the defendants;) and there was no other evidence that the Magistrates who took the deposition acted under a Commission; and because it appeared, from the Clerk's endorsement, in these words, "*Returned open, 22d August 1816,*" that the said deposition was returned to his Office, *open and unsealed*. The Court sustaining this objection also, the defendants again excepted.

After the deed of emancipation had been read to the Jury, and the defendants had given in evidence declarations made by *Thomas Reynolds*, (not in the presence of *John*,) for the purpose of proving that a sale had been made of the negroes, by the said *Thomas* to *John*, after the said *John* had come to the possession thereof, (some of which declarations were made after said *John* had so come to the possession,) the plaintiffs offered to give in evidence other declarations made by said *Thomas*, (not in the presence of *John*,) after the latter had come to the possession as aforesaid, for the purpose of proving that, when the negroes first came to his possession, they continued to be the property of *Thomas*, and came with his consent to *John's* possession:—to which evidence the

OCTOBER,  
1818.

Givens and  
Reynolds  
v.  
Manns.

defendants objecting, it was excluded by the Court; and thereupon the *plaintiffs* excepted.

After the Court had rejected the evidence offered by the defendants, (as stated in the first bill of exceptions,) the defendants introduced a Witness who swore that, some time previous to the deed of emancipation, (how long he did not recollect,) he heard *Thomas Reynolds* say that he had sold to *John Reynolds*, or let him have the negroes, "and that said John was to keep him and furnish him with suitable cloathing, which he had failed to do." The plaintiffs' Counsel then moved the Court to instruct the Jury that, if they should be of opinion that the sale spoken of by said witness was the same sale of which evidence had been rejected as aforesaid, they ought to disregard said evidence so far as the same went to prove a sale of the negroes by *Thomas* to *John*:—and it being admitted that said negroes were the property of *Thomas* up to the time when they came to the possession of *John*, the plaintiffs' Counsel moved the Court farther to instruct the Jury, that if they should be satisfied, from the evidence in the cause, that, when the said *John* came to the possession of said negroes, the right of property was not transferred to him by said *Thomas*, then, unless they should be satisfied that the said *John* subsequently and previously to the deed of emancipation, acquired the right of property by alienation to him, the mere continued possession thereof for more than five years would not bar the plaintiffs' right under the deed of emancipation. Whereupon, the Court gave the first instruction, but declined giving the last, and left it to the Jury; all which, on the application of the plaintiffs' Counsel, was ordered to be spread on the record.

A verdict was found, and judgment rendered, for the plaintiffs, which being affirmed upon an appeal to the Superior Court of law, the defendants again appealed.

*Wickham* for the appellants.—1. A Bill of sale for the slaves was not a necessary muniment of our title; for personal property passes by *delivery* (a) without a deed. 2. That title, too, became unquestionable by five years uninterrupted possession. The right of the slaves to

(a) *Jacob v. Lindsay*, 1 East. 460.

freedom cannot stand on a better footing than that of the person under whom they claim.

OCTOBER,  
1818.

GIVENS and  
REYNOLDS  
v.  
MANN.

3. The Court at the instance of the plaintiffs suppressed evidence concerning the sale, and gave the most singular instruction that ever was given by a Court. How could the Jury know whether it was the same sale, or not, when the evidence in relation to it had been excluded?

4. The deposition of *Caldwell* ought not to have been excluded; for it appears that a Commission to take it actually issued, and, not being found among the papers, must have been mislaid.

*Leigh* for the appellees. The main point, certainly, is that presented by the first bill of exceptions; but, in the first place, I will endeavour to clear the case of minor objections.

1. *Caldwell's* deposition was properly excluded. In England, commissions to take depositions *de bene esse*, as evidence in trials at law, are awarded only on consent of parties.<sup>(b)</sup> In Virginia, they are authorised by Act of Assembly in particular circumstances. But, in both Countries, the practice, doubtless, is adopted to save the necessity of resorting to a Court of Chancery to award the commissions for obtaining such depositions. We therefore must look to the practice in Chancery to ascertain the form of such commissions, and modes of executing and returning them. And there, surely, it is not sufficient that the commission be awarded and issued, but it must be *delivered* to the Commissioners; and, regularly, it must be returned.<sup>(c)</sup> Such is the constant practice. But, in this case, it does not appear that the Commission ever was delivered to the Commissioners:—they do not even profess to act under it's authority:—in other words, it does not appear that they had any authority at all.

(b) 3 *Tuck*,  
Bl. 383.

(c) 1 *Harn*.  
Ch. Prac.  
330.

Again; the deposition was returned open.—The rules of practice prevailing in Virginia, in regard to *publication* of depositions, are certainly different from those in England; but, in *this* respect, the practice is the same in both Countries; the depositions must be returned

O'Connor,  
1818.

Givens and  
Reynolds  
v.  
Manns.

*under cover, sealed up.* The Commission itself always requires it; and such rule is necessary, to prevent undue practices, to alter the testimony, or, indeed, to suppress it, if found unfavourable. (d)

(d) Harr.  
Ch. Prac.  
328, 350.

2. As to the instruction given by the County Court in relation to the character of the transfer of possession from *Thomas Reynolds* to his son; there can be no question, *now*, concerning it, (according to the settled practice in our Courts,) whether that instruction was right or wrong. The defendants acquiesced in it at the time: they neither opposed it before, nor excepted to it after it was given:—they can not therefore be permitted to stand by in silence, take their chance before the Jury, and, if the result be unfavourable, avail themselves, in order to impeach the verdict and judgment, of an error of which they made no complaint at the trial.

3. The principal question remains; whether parol evidence could be given of the contents of the alledged bill of sale, without accounting for the non production of the instrument itself in a more satisfactory manner.

It may be remarked, in the first place, that, before this objection was made, the defendants had already examined several Witnesses to prove the sale; and then, the Court did not instruct the Jury to disregard the evidence that had been given on that point, but only excluded *other* evidence on the same point. It appears, too, from the exceptions filed by the plaintiffs, that the defendants did, even after farther evidence on that head had been excluded by the Court, adduce testimony of the very kind which the Court had declared inadmissible:—so that, notwithstanding that opinion, which it seems the Court did not *enforce*, they in fact availed themselves of the benefit of the evidence intended to have been excluded.

Excepting the testimony that *Thomas Reynolds* said his son *John* had lost the bill of sale, there is none other that it *was* lost. If ever there was a case in which a party should be held to strict proof of the loss of an instrument, before he should be allowed to prove it's contents, this is one. The paper was certainly not lost before

*John Reynolds* had notice of his father's design to emancipate or alienate the slaves; for he afterwards consulted Counsel on it's effect. and it is probable it was not lost 'till after the deed of emancipation was recorded. Here then was the strongest motive for a careful preservation of it; so that, if it were lost, it would be wonderful that the very time, cause and manner of such loss could not be proved. With full notice of the deed of emancipation on record, *John* would have complained of the loss of his title paper to every neighbour he had. The purchasers from him could not have failed to hear of such a remarkable fact as this recorded manumission; and they doubtless enquired of their vendor as to the particulars of his title, and the fate that had befallen the evidence of it. Yet no kind of evidence is adduced to shew when or how this paper was lost; which evidence was indispensable to enable them to prove it's contents.<sup>(c)</sup> It does not even appear that any enquiry had been made, for the paper, of *John Reynolds'* representatives.

OCTOBER,  
1818.

Givens and  
Reynolds  
v.  
Manns.

4. Length of possession is now relied upon by the defendants, though, in the Court below, they made no such objection to our right:—but, to suits for *freedom*, the act of limitations is no bar. The slavish condition and ignorance of the plaintiffs exempt them from it's operation.

*Wickham* in reply. I admit the act of limitations does not run, against the plaintiffs, since the date of the deed of emancipation: but they claim under *Thomas Reynolds*:—if his title was barred by length of time, before he executed the deed, he could convey no right by the deed; because the slaves were then the property of another.

As to the instruction, if it was erroneous and appears on the record, a bill of exceptions is not necessary; the only object of which is, to get the thing spread on the record. There is no appearance of any *assent*, or *waiving* of the objection, on the part of the defendants.—Either *Mr. Leigh* is wrong, or the record is. The Court did exclude the defendants' parol testimony to prove the sale, after it was discovered there was a bill of sale.—That instrument was not a part of the *res gesta* at the time of the sale:—it was executed afterwards, being

(c) *Peake*  
on *Ev'ca.* 97.



OCTOBER,  
1818.

Givens and  
Reynolds  
v.  
Manna.

the plaintiffs be at all entitled to freedom, their remedy is in *equity*, not in a Court of *law*.

*Leigh*. If there be a remedy in equity, there is one at law, in *this case*; for, in pauper causes, the question is, as to the mere *right* to freedom, unshackled by technical rules.

The Deed's being recorded in the *District Court* is not important. Even in the case of a Patent, Judge PENDLETON, in his opinion in *Lee v. Tapscott*, 2 *Wash.* 276, lays it down as a general principle, that the *attested copy* of a Patent recorded in a *County Court*, is as good as a Copy from the Register's office.

*Wickham*. The case of *Lee v. Tapscott* relates altogether to *old Patents*. A copy of a Patent *now* recorded in a *County Court*, would certainly not be evidence.

The following was this Court's opinion.

The Court,) not deciding whether a Deed of emancipation of slaves, of which another holds adverse possession at the time, is competent to confer a right to freedom,) is of opinion, that the admitted possession by *John Reynolds*, under whom the appellant claims, of the appellee and the other slaves in the first Bill of exceptions mentioned, being more than five years before the alledged Deed of Emancipation was executed, the appellant had a right to prove that such possession was adverse to *Thomas Reynolds*, the former owner of said slaves, either by the acknowledgment of said *Thomas*, that such possession was adverse, (as that they were held by said *John* as a purchaser from him, or otherwise by adverse claim,) or by any other evidence proving the adversary nature of such possession; and that it should have been left to the Jury to decide whether such declarations were made before or after the execution of the said Deed; with directions that any such declaration made thereafter should be rejected by them.

The Court is also of opinion, that a bill of sale of personal property, (not being necessary to pass the title,) need not be shewn in evidence by persons claiming under the grantee, in a controversy between them and the grantor, or those claiming under him; but that

OCTOBER,  
1818.GIVENS and  
REYNOLDS  
v.  
MANNO.

the former may prove, by any other legal evidence, a title in the person under whom they claim; and that such grantee or his representatives may prove their title by other evidence than the Bill of Sale, unless it is alledged that such Bill of sale contains other matter than the mere transfer of the property, (and of which the grantor, or those claiming under him, might avail themselves,) and notice be given to produce it; but in neither case can the substance or contents of the Bill of Sale be given in evidence without due affidavit by the party, or other satisfactory proof of it's loss, or that it is not in the power of the party so offering the evidence. The Court erred therefore in rejecting the evidence of the declarations of *Thomas Reynolds*, and the other evidence offered to prove a sale by him; and also in rejecting the evidence of the witness *Hancock*, so far as it tended to prove an adversary possession in the said *John Reynolds*; but that the same ought not to have been relied upon as tending to prove the contents of the Bill of Sale, in the absence of sufficient proof that the same was not then in the possession or power of the party.

The Court is farther of opinion that the alledged deed of emancipation, (made part of the record in this Bill of exceptions,) not being acknowledged or proved in the Court of the County or Corporation, as the law directs, was not so authenticated as to make it evidence in the trial, nor ought to be received as such evidence until it shall be proved or acknowledged before the proper Court.

The Court is also of opinion, that there was no error in rejecting the evidence mentioned in the third Bill of Exceptions; and that, as the instruction contained in the fourth Bill of Exceptions was predicated on the rejection of the evidence mentioned in the first, the same was erroneous;—that there was also no error in refusing to give the last instruction asked for and stated in the said fourth bill of exceptions; but, instead of leaving the matter thereof to the Jury, they ought to have been instructed, that, if the possession of *John* was adverse to that of *Thomas*, and so continued for five years before the

OCTOBER,  
1818.

Givens and  
Reynolds  
v.  
Manns.

execution of the deed of emancipation, such possession as effectually prevented the operation of that Deed, as the change of property by alienation.

With respect to the deposition mentioned in the second bill of exceptions, a majority of the Court is of opinion that, as it sufficiently appears to have been taken under a Commission, and upon notice, and as the same is not shown to have been erased or altered, and as, for aught appearing by the Clerk's endorsement, it may have been returned open by the magistrates themselves, it would be too strict to reject it as evidence at the trial; and that there is error in the judgment of the Court in this particular.

The Judgment is to be reversed, and the cause remanded, with directions to the Court to admit the evidence, so improperly rejected, if again offered.

Decided  
OCTOBER 26,  
1818.

### Cabell's executors against Megginson's administrators.

1. A devisee of nearly all the estate of a principal debtor, gave a bond to indemnify the estate of the surety against the debt; in which bond one of the executors of the surety bound himself, in his individual character, as surety for the said devisee. The creditor, afterwards, obtained a judgment, in the Federal Court, against the said executors; one of whom, (viz. the same who was co-obligor in the bond of indemnity,) paid off the Judgment. The said bond being in the possession of one of the obligees, who resided out of the State, and refused to let them have it, the Executors brought a suit in Chancery, against the said devisee, (the plaintiffs and defendant being all citizens and residents of this State,) to recover of him the money so paid; and the Court's jurisdiction was sustained.

2. It seems, that, if a judgment be rendered, in a Federal Court, against the executors of a surety, and they pay the money; they cannot recover it against a devisee of the principal debtor, by motion, or any action at common law, in the General Court or any other Court of law, of this Commonwealth.

3. According to the practice in our Courts of Equity, it seems that a Bill to set up a lost bond, need not be supported by the plaintiff's affidavit.

the said *Joseph C. Megginson*, who was the son of his daughter. In 1797, he settled his accounts as administrator and guardian, and *Joseph C. Megginson* gave him a receipt in full for all his transactions as such. In 1798; he died, having by his Will given a considerable property to the same *Joseph C.*, and farther devised as follows: "It is also my desire that my grandson *Joseph C. Megginson* may be released by my executors from all demands and debts on account of his father's estate to mine, except the British debt I stand bound as security for his father."

OCTOBER,  
1818.  
Cabell's ex-  
ecutors  
v.  
Megginson's  
administra-  
tors.

After the death of *Joseph Cabell*, his executors and other devisees and legatees, entertaining apprehensions on account of the said British debt, expressed the same to *Joseph C. Megginson*, who thereupon assured them that the debt was paid off or nearly so, and that he had vouchers to prove it; but, to prevent the possibility of injury from that quarter, they proposed to give him a thousand dollars to indemnify the estate of their testator; to which he agreed, and accepted two negro men slaves, valued at that sum, in consideration whereof he executed a bond, to *Robert C. Harrison*, *William J. Lewis* (one of the executors,) and *John Brackenridge*, conditioned to indemnify the estate of his grandfather, against the said British debt, and all claims on account of his father's estate; and *Joseph Cabell* (the other executor,) became the surety to the said bond, in his individual character.

*George Rippen & Co.* afterwards instituted a suit in the Federal Court, and obtained a judgment, against the said executors, for the sum of 865l. 15s. 3d. which was paid by the last mentioned *Joseph Cabell* to *James Lyle* the factor and agent of the said Company, on the 23d of October 1808.

Suit was then brought, by the Executors, against *Joseph C. Megginson*, in the Superior Court of Chancery for the Richmond District, to recover of him the money so paid; the plaintiffs alledging in their Bill, that the bond of indemnity given as aforesaid was lost by time or accident, and no copy thereof was in their possession;

OCTOBER,  
1818.

Cabell's ex-  
ecutors

v.  
Megginson's  
administra-  
tors.

that the parties interested considered the plaintiff *Cabell* responsible individually, in consequence of his suretyship aforesaid, but were willing that the claim should be fixed at once on the proper person.

The defendant, by his answer, admitted the material statements of the bill, but alledged that the sum recovered by *Kippen & Co.* was much more than was due; that, before the said recovery was had, the complainants were informed by him that he had sundry vouchers to prove this; a description of which was given in the answer; that the Complainants failed to apply to him for the said vouchers, and to make the proper defence to the suit of *Kippen & Co.*, to whom, therefore, the Complainant *Cabell* paid the money in his own wrong. The defendant alledged that he had not received a portion of certain slaves devised to him by his grandfather, which were sold by the said *Cabell*.

He filed a cross-bill against the Complainants, making *Kippen & Co.*, and *James Lyle* their agent or factor, and *John Cabell*, defendants thereto; alledging his belief that the debt to *Kippen & Co.* was nearly paid; that, not being a party to the suit brought by them, he supposed he could not defend it; that he believed many of his father's papers were in the possession of *John Cabell* and of the said Complainants, of which he prayed a discovery from them; and, also, from *Kippen & Co.* and *Lyle*, an account of all the payments made towards the said debt; and that their books be produced for examination. *John Cabell*, and the plaintiffs in the first suit, all denied possession of any such papers. *Joseph Cabell* in his answer stated that, during the pendency of the British suit, he frequently applied to *Megginson* for vouchers, but could not obtain them until after it was decided; and then he found that credit had been given for all the payments shewn by those vouchers, and for many more: that, as to the negroes, part of whom were devised by *Joseph Cabell* the elder to *Megginson*, they did not belong to the testator; that the other devisees had gratuitously given *Megginson* a moiety of a tract of land of 3000 acres, and that the respondent had given a negro to each of *Megginson's*

children. He exhibited with his answer a copy of the bond of indemnity, (admitted by *Megginson* to be a true copy;) stating the original to be in the hands of *Robert C. Harrison*, in Kentucky, who would not give it up.

OCTOBER,  
1818.

*Cabell's ex-  
cutors  
v.  
Megginson's  
administra-  
tors,*

The suits abated as to *Megginson* by his death, and were revived in the names of his administrators.

The cross suit does not appear to have been matured for hearing as to *Kippen & Co.* and *Lyle*, when both causes were brought on to be heard by consent of parties.

Chancellor TAYLOR, "being of opinion that, when  
"the plaintiffs paid the debt in the bill mentioned, as re-  
"presenting *Joseph Cabell* the security of *William Meg-  
"ginson*, to *George Kippen & Co.*, they, the plaintiffs,  
"had a plain remedy, at law, against the defendant in  
"the first suit, as appears by their bill, and might have  
"been reimbursed by a motion, under the Act to em-  
"power securities to recover damages in a summary  
"way," dismissed their Bill, with costs, "without pre-  
"judice to any suit they might be advised to institute,  
"either under that act, or at the common law, for recovery  
"of the money in the bill mentioned." He dismissed also  
the cross bill, at *Megginson's* costs, and ordered the Clerk to put the costs of one suit against the other, that the balance might be known, so that only one execution might issue.

From this decree the plaintiffs in the first suit appealed.

*Stanard* for the appellants, insisted, that, independently of the bond of indemnity, they were entitled, as executors of the surety, to relief in *Equity*:—

1st, Because the statutory remedy by motion does not oust the Court of Equity of its pre-existing jurisdiction over the subject;—

2dly, Because there was no *State* Court competent to give effect to the remedy by motion. The judgment was in the *Federal* Court, and the Act of Assembly gives the remedy in that Court only, in which the judgment was rendered. Even the *Federal* Court had not jurisdiction; for all the parties were citizens of this State:—

OCTOBER,  
1818.

Cabell's ex-  
ecutors  
v.

Meggins's  
administrators.

3dly, Because there was no person against whom the motion could be made; there being no living executor or administrator of the original debtor:—

4thly, Because, *at that time*, the statutory remedy was inadequate; since, on the recovery by motion, interest was not allowed.

The complainants were also entitled to relief on account of the *loss of the bond* of indemnity. Besides,—*Joseph Cabell*, who paid the amount of the Judgment, (being bound as *Meggins's* surety that it should be paid,) could not charge the disbursement in his account as executor. *He* had no remedy by motion against *Meggins*, as no judgment had been rendered on the bond to which *he* was the surety; and he was clearly entitled to relief.

*John Robertson contra.*—This is a case purely of common law jurisdiction. Admitting that the plaintiffs, representing the original surety, had no remedy by *motion*, they might have resorted to their action of *assumpsit*. But, in fact, their motion might have been made in the

(a) Edit.  
of 1794, 1803  
and '14, c.  
65. § 5.

*General Court.* (a) It does not appear in the Record, that the estate of *William Meggins* the principal debtor was not represented. On the contrary, *Joseph C. Meggins* was his *heir*; and, by the Act of Assembly, the motion is authorised against "*heirs, executors or administrators.*" (b)

(b) *Ibid.* c.  
145. § 1.

The Judgment being obtained in 1808, the remedy was complete for *interest*, as well as for the sum paid. (c)

(c) See  
Edit. of  
1808, c. 87.  
p. 114.

The ground taken to give the Court jurisdiction, that the Bond of indemnity was *lost*, is admitted by the answer to the cross bill not to be founded in fact. But, as to this point, the bill should have been supported by *affi-*

(d) *Fonbl. davit.*  
16. *Cooper's*  
Eq. 267.

(d) It is therefore defective on it's face, and was properly dismissed, though no plea to the jurisdiction was

(e) *Pollard* filed. (e)

v. *Patterson's*  
adm'r. 3. H.  
§ M. 67.

*Samuel Taylor* on the same side. The question resolves itself to this. Will a Court of Equity maintain a Bill for the sole purpose of compelling a principal to repay money to his surety?

**Stanard** in reply.—An affidavit to a Bill for setting up a lost bond, is, I doubt not, required by *English* practice: but I have never known such a bill verified by the Plaintiff's affidavit, in this Country. Admitting, however, it were necessary, advantage of the omission ought to be taken by demurrer. If it be not demanded in the Court below, objection for want of it ought not to be made in the appellate Court.

OCTOBER  
1818.

Cabell's ex-  
cutors  
v.  
Megginson's  
administra-  
tors.

**Megginson's** answer does not deny the loss of the bond. The fact made out in the cross suit is, that, though in existence, it is indeed lost to us, being out of our power, and beyond the jurisdiction of any Court in this State.

Judge **ROANE** pronounced the Court's opinion, that the Decree in the original suit was erroneous in dismissing the Bill for want of jurisdiction; that it therefore be reversed, and the cause remanded, to be farther proceeded in upon it's merits; and that so much of the said Decree as dismissed the cross-bill, be affirmed.

## Ruffners against Barrett.

Decided  
October 30,  
1818.

The appellee exhibited a bill in the Superior Court of Chancery for the Staunton District, against **Daniel Ruffner**, **Joseph Ruffner** and **Samuel Henry**, setting forth that he executed his bond to **Joseph Ruffner** and **Samuel Henry** executors of **J. Ruffner**, for \$119,50, that **Joseph Ruffner** assigned it to **Daniel Ruffner**; that the complainant paid the money to **Samuel Henry**, without notice of the

1. Upon a Bill of Injunction filed, a new trial at law was granted; a verdict was found for the complainant, but certified by the Judge to be

against the weight of evidence; another trial being directed, a second verdict was found as before; whereupon, the Judge certified with the verdict all the evidence given to the Jury; from which it clearly appeared that the merits of the case were against the complainant. The Court of Appeals thereupon, did not award another trial, but dissolved the Injunction, and dismissed the Bill with costs.

2. The assignor and assignee of a bond being made defendants to a bill exhibited by the obligor, for an Injunction and for general relief; he alleging that he paid the money to the assignor without notice of the assignment; if that allegation be afterwards disproved, whereupon the Injunction is dissolved, and the Bill dismissed as to the assignee; the cause ought yet to be retained and farther proceeded in, to give the complainant relief against the assignor.



Corroan,  
1810

Ruffners  
v.  
Barrett.

assignment, and took his receipt, to which one *John Henry* was subscribing witness; that the assignee brought suit on the bond in the Superior Court of Cabell county, and obtained judgment, the subscribing Witness to the receipt being absent. He prayed an injunction, and general relief.

The Injunction was awarded. The *Ruffners*, by their answers, stated that the sale of the property, for the price of which the bond was taken, was made by the executors for the benefit of *Daniel Ruffner*; and that this was notorious at the time; that, accordingly, the bond was immediately transferred to him; that *Barrett* the Complainant was well apprised of all this, and, before his payment to *Samuel Henry*, had full notice of the assignment.

To these answers the plaintiff replied generally:—a decree *nisi* was entered against *Henry*, but does not appear to have been served.

*Barrett* exhibited his receipt, and filed several depositions proving the payment, and tending to prove it was bona fide.

*Daniel Ruffner* filed a deposition to prove that *Barrett* had notice of the transfer of the bond to him, at the very time of it's execution. Upon a motion to dissolve the Injunction, Chancellor *Brown* directed a new trial at the bar of Cabell Superior Court: a verdict was found for *Barrett*; but the Court certified, with it, that the weight of evidence was in favour of *Ruffner*. The Chancellor directed another trial, which being had, the Jury found again for *Barrett*. The Court certified the verdict, and with it all the evidence given before the Jury; from which it clearly appeared that *Barrett*, before he paid the money to *Henry* had full notice of the assignment of the bond to *Daniel Ruffner*.

The Chancellor perpetuated the Injunction; and *Ruffner* appealed.

*Leigh* for the appellant.

Since all the evidence which was before the Jury appears to this Court, and the merits are clearly in favour of the plaintiff at law, there is no necessity for awarding

another trial, but the Court may direct the Injunction to be dissolved and the Bill dismissed.

OCTOBER,  
1818.

*Stanard contra.* It is not necessary for me to discuss the evidence after two concurring Verdicts. This Court cannot judge of the credibility of the Witnesses, as the *Jury* could. Their manner of giving testimony, their looks, could be seen by *them*, but can not now be known by this Court. (a) In strictness the Chancellor ought not to have granted the second new trial, the Judge's certificate being, merely, that the *weight* of evidence was against the verdict. (b)

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Buffners  
v  
Barrett.

(a) *Stanard v. Graves.* 2  
Call 369-374

(b) *Swain v. Hall,* 3  
Will. 45.

*Leigh* in reply. The verdict and decree are not only against the *weight* of evidence, but against the evidence altogether; for there is no contradictory testimony in the case. In *Shanks and McRae v. Fenwick*, 2 *Munf.* 478, this Court regarded the weight of evidence, and discarded all other considerations. In *Stanard v. Graves*, three concurring verdicts had been given on the same evidence. If in this case there were three such verdicts, I should submit.

BY THIS COURT, the Decree was reversed, the Injunction dissolved, and the Bill dismissed with Costs, October 30th 1818. This Order was re-considered, November 4th; amended by setting aside the dismissal of the Bill as to *Samuel Henry*; and the cause remanded to the Court of Chancery, to be farther proceeded in against him.

Decided  
October 30,  
1818.

## Snelson & Co. against Franklin.

1. In the sale of a lease of a house and tenement in a town, if the vendor fail to shew the lease to the vendee, and do not inform him of a Covenant therein, that, in case of destruction of the house by fire, the lease shall terminate and become void; this is such a concealment as vitiates the contract; and, if the house be destroyed by fire in a short time, Equity will relieve the vendee by enjoining the Vendor from collecting the purchase money, and by directing his notes for the same to be given up and cancelled.

FRANKLIN exhibited his Bill against *Snelson & Co.* in the Superior Court of Chancery for the Richmond District, setting forth, that, on the 15th of March 1811, Doctor *John R. Archer* leased a house and tenement in Petersburg to *Snelson & Co.* for the term of eight years and five months, to commence on the first of May in that year, and to determine on the 1st of October 1819, at the annual rent of \$200, and, for the last five months, at the rent of \$83 33 1-3 cents; with a covenant that losses by fire, lightning and tempest, were excepted; and that, in case of destruction by such accidents, the lease should terminate, and become void, but *Snelson & Co.* should pay the rent up to the time of such destruction:—that, on the 15th of July 1815, a contract was made between the complainant and defendants, whereby the former was to take the lease of a moiety of the premises, from that day to the end of the term, to pay them \$1500 for the same, by instalments, and moreover to pay half the rent per annum to Doctor *Archer*:—that articles were drawn on the same day, which state that *Franklin* had taken the lease; (without adding that possession was to be delivered to him on the Monday following, as was in truth the agreement;) and that, in point of fact, possession was never delivered: that he gave his notes negotiable at Bank for the three instalments of the \$1500; that he had never seen *Archer's* lease, and was utterly ignorant of the covenant for termination of the lease in case of destruction by fire, &c.; that, on the night of Sunday, July 16th, the whole house was destroyed by the great fire at Petersburg; yet, notwithstanding such destruction, whereby the lease was terminated, the defendants insisted on payment of the said three notes negotiable at Bank. The Bill prayed therefore, that they be enjoined from depositing the said notes in Bank for collection; that the notes be delivered up to be cancelled; and for general relief.

The Injunction was awarded. *Snelson & Co.* answer-

ed, that, having built a new house on the premises, they sold to the plaintiff their unexpired term in a moiety of the tenement; that it was the intention of the bargain that, as to that moiety, *he should stand in all respects in the same situation they stood in*; and that he was to pay them the purchase money *at all events*. They admitted that they did not show him their lease from *Archer*, nor mention to him the covenant therein for the termination thereof in case of destruction by fire &c. They denied the alledged agreement that possession should be delivered on Monday July 17th; insisting that he took the lease on and from July 15th.

OCTOBER,  
1818.

Snelson  
& Co.  
v.  
Franklin.

The Complainant replied generally; and commissions were awarded. Depositions were taken, on one side, to prove that, in truth, possession was delivered on the 15th of July 1815; and, on the other, that it was not delivered, nor was to have been delivered, until Monday, July 17th. A witness swore that, on the said 15th of July, the Complainant, in conversation with him, agreed that, if the house should be burnt on the next day, it would be his loss. It was also proved that *Archer* had re-entered on the premises since the fire, and leased the ground to *Hector McNeil*, the chief acting partner of the firm of *Snelson & Co.*, for a term of twenty two years.

At June Term 1816, Chancellor TAYLOR perpetuated the Injunction. and decreed that the defendants should deliver up to *Franklin* his negotiable notes, to be cancelled; whereupon the defendants appealed.

*May* for the appellants.

This is a contract under seal; from which the Court will not infer any thing more than it expresses. There is no *warranty* in it. Could an action at law have been maintained upon it by the Complainant against *McNeil* and *Snelson*? They merely sold their lease as they held it. Shall the mere circumstance of his coming into equity to obtain an Injunction, to prevent their collecting the money, give him a right which he had not at law?

*Leigh* for the appellee.

The important circumstance, that the lease was to terminate in case of destruction of the house by fire, was

OCTOBER,  
1818.

Snelson  
& Co.  
v.  
Franklin.

concealed.—Such concealment is constructive fraud; and, whether so designed or not, it had all the effect of a fraud on us. If the money had been paid, it might have been recovered by *assumpsit* for money had and received, the consideration having failed. The Court of Equity, then, may exert it's preventive power.

The statements in the answer are not reconcilable with each other. It is there acknowledged that this circumstance was concealed; yet it is also said that the purchaser of the lease was to stand in all respects in the same situation with the original lessees! He took upon him indeed the risk of loss by fire, so far that he supposed he was to pay the rent though the house should be burnt; but he did not suppose that, in such event, he was to lose the lease altogether: he knew nothing of that stipulation.

There is a representation in the articles of agreement that the lease was to continue four years: which representation amounted to a covenant to that effect: but all the benefit that, at the utmost, passed to the purchaser was two days possession of the premises.

October 30th, 1818, the Court affirmed the Decree.

Decided,  
November  
2d,  
1818.

## Baker against Glass and Glass against Baker.

1. If parties negotiating for the sale of a tract of land, agree in writing, upon a specified price per acre; but that the vendor shall take, in payment, a house and lot of the Vendee, at cash value, to be pronounced by two persons, (not naming them;) or the money, by certain instalments, in case the vendee shall prefer paying money; and afterwards, (the vendee not having elected to pay money for the land,) the parties, by endorsement on the writing, appoint two persons to value the house and lot, who attempt to do so, but differ in opinion; whereupon they verbally agree to make another appointment, at some other time not specified; the contract is too incomplete to be enforced by a Court of Equity.

“Creek of 66 2-3 acres, to *Joseph Glass*, on the following conditions; for two dollars per acre, provided they will suit *Joseph Glass* on his return from Kentucky; then the said *Isaac Baker* is to take a house and lot in Middletown in Berkeley county, Virginia, to be valued by two persons what said property is worth in Cash, or to allow said *Joseph Glass* fifteen hundred dollars, if it will rent for a term of years at seventy five dollars, and so on, in proportion, should it rent for more than the abovementioned sum. Or if the said *Joseph Glass* should prefer paying me the money,(1) the said *Baker* agrees to take the following payments, viz; one third in September 1811, one third in September 1812, and the balance in September 1813.”

NOVEMBER,  
1818.

*Baker*  
v.  
*Glass,*  
and  
*Glass*  
v.  
*Baker.*

Signed and sealed by both parties; dated January 24th 1810; and attested by a Witness; with a clause subjoined, (which also was signed and sealed;) viz:

“N. B. It is understood that there is to be a general Warranty given by both parties, for Lands, and House and Lot.”

*Glass* went to Kentucky, saw the lands, and on his return told *Baker* he was willing to take them.

On the 24th of May 1810, they agreed, by endorsement on the original agreement, to leave the valuation of the house and lot to *William Wilson* and *David Castleman junr.* The said referees, after viewing the property, could not agree in opinion, and *Baker* refused to appoint an umpire, though *Glass* proposed it. Before they separated, however, it was verbally agreed by *Baker* as well as *Glass*, that other referees should be appointed at some other time, but no day was fixed on for making such appointment; and *Baker*, soon afterwards, declared that he considered the contract void, and demanded a surrender of the writing. *Glass* refused to give it up, and tendered to *Baker* a Deed conveying to him, in fee

(1) Note. *Glass* never declared his election to pay the money, in preference to letting *Baker* have the house and lot. It seems too, that the rent that could be obtained was less than 75 dollars per annum, so that the alternative allowance of \$1500, was thrown out of the question.

NOVEMBER,  
1818.

Baker  
v.  
Glass,  
and  
Glass  
v.  
Baker.

simple, with general warranty, the House and Lot in Middletown, with twenty or thirty dollars, which he considered the difference in value between that property and the Lands in Kentucky; which Deed and money *Baker* refused to receive.

A Bill was thereupon filed by *Glass*, in the superior Court of Chancery for the Winchester District, praying that *Baker* be decreed to convey to him the Kentucky lands, "upon his doing *what the Court should think proper*," and that such other relief be given as justice required.

The defendant by his answer, contended that the Court ought to pronounce the contract *void*, but said he was willing that a sale of the House and lot on twelve months credit should be directed, with an assignment to him, by the Complainant, of the Bonds taken at such sale, (the property to be held liable for payment thereof,) and a decree for the balance, with interest from the date of the written agreement; or that the Complainant should be decreed to pay for the *whole land, in cash*, at two dollars per acre, the last day of payment having nearly arrived. The respondent was then and had always been willing to let him have the land for *money*, at the price, and according to the alternative terms of the agreement.

Chancellor CARR appointed *Edward McGuire* and *James Stephenson*, (or, if they should disagree, *Daniel Lee* as their umpire,) to say how much the House and Lot were worth in cash on the 12th of May 1810, and how much at the time of their valuation; directing them if the value was less at that time than on the said 12th of May 1810, to say what, in their opinion, had caused such depreciation of value. The said referees reported the value at both periods to be the same; to wit, twelve hundred dollars: whereupon the Chancellor was of opinion, that the Complainant, having executed the Deed filed among the proceedings since the last term, would be entitled to a specific performance of the contract in the Bill mentioned, upon his paying the balance of the purchase money for the Kentucky land. He therefore de-

creed that if the complainant, on or before the expiration of six months, from the date of this decree, should pay to the defendant the sum of \$733 33 cents, with interest 'till paid, on one third of that sum from September 30th 1811, on another third from September 30th 1812, and on the residue from September 30th 1813, then the defendant should forthwith make and execute to the Complainant a Deed in fee simple, with general warranty, for the Lands in Kentucky mentioned in the articles of agreement; should accept the Deed for the House and Lot, and pay the costs of the suit: but, if the Complainant should fail in making the said payment, his bill should be dismissed with costs.

NOVEMBER,  
1818.

Baker  
v.  
Glass;  
and  
Glass  
v.  
Baker.

This decree was afterwards so modified as to permit the Complainant to pay the money and interest into Court, to be handed over to the defendant; which payment he accordingly made; but then appealed from so much of the decree as directed that he should pay *interest*. The defendant also appealed; and, on his motion, a Receiver was appointed to put out the money to interest, until the said appeals should be decided.

*Wickham* for the defendant, (among other points which need not here be mentioned,) relied upon the cases of *Smallwood v. Mercer* and *Hansbrough*, 1 *Wash.* 290; *Graham v. Call executor of Means*, 5 *Munf.* 396; *Cooth v. Jackson*, 6 *Vesey jr.* 34; and *Milnes v. Gery*, 14 *Vesey jr.* 400, as shewing that the bargain in this case was too incomplete to be enforced by a Court of equity. It is true that *Baker* made a proposition in his answer; but it was not accepted, and therefore was not binding.

*Stanard* for the complainant, said the contract was of two parts; first, to sell at a stipulated price the Kentucky land: so far, it was consummate, as soon as *Glass* agreed to take the land. Subordinate to this, was the second part, prescribing the modes in which *Glass* was at liberty to effect the payment of the purchase money. The selection of either of those modes had no influence on the main contract. If it were true that the disagreement of the valuers liberated *Baker* from proceeding farther in the



NOVEMBER,  
1818.

Baker  
v.  
Glass,  
and  
Glass  
v.  
Baker.

valuation, it merely discharged him from the obligation of taking payment in *that* mode: it did not deprive *Glass* of the privilege of paying in the other mode authorised by the contract. The effect of such an event is only co-extensive with the subject on which it operates: it excludes the house and lot as a means of payment, but it does not defeat the contract, unless the exclusion of the house and lot as a means of payment, works that effect *per se*. That such can not be the case, is plainly demonstrable.

Suppose the house had been destroyed; would *Glass* be deprived of the privilege of paying for the Kentucky land by the instalments stipulated? An abortive attempt to give it a price, so as to make it a means of payment, would, at most, disable *Glass* from making the payment in that way; but such disability would not deprive him of the privilege of embracing the other alternative.

*Glass* had the privilege of one of two modes, as his choice. If the effort to pay in *one* mode was frustrated, surely he is entitled to claim the benefit of the contract, on paying in the *other*.

The prayer of the Bill is framed with a view to any construction the Court may give the agreement; and while *Glass* insists that he has done every thing that he ought to have done to entitle himself to the benefit of the contract, he declares his readiness to do any thing the Court shall think he ought to do. It is therefore insisted that, at all events, *Glass* is entitled to the execution of the contract, whether *Baker* be or be not bound to proceed in the valuation of the house and lot.

But, 2dly, the Court did right in proceeding with that valuation, and making it a payment in part for the Kentucky land. According to the terms of the contract, the house and lot were to be valued in cash by two persons. Is this more or less than a sale at valuation general? If the words were, "*to be valued in cash,*" it would be so; or there could be no sale at valuation. If you go farther, and say, "*to be valued by one or more persons in cash,*"

NOVEMBER,  
1818.



Baker  
v.  
Glass, and  
Glass  
v.  
Baker.

this is but an equivalent expression; for the words added are nothing more than the expression of what is implied in the original phrase. In what does the phrase used in the contract differ from this? It can not, with any shew of reason, be contended, that there is, or ought to be, any essential difference in the rights of the parties, to have the aid of the Court to get the valuation made, under either form of expression. If, when the stipulation is to take the property at valuation, or at the valuation of *one or more* persons, the aid of the Court may be obtained; it ought not to be withheld when the stipulation is to take it at the valuation of *two* persons. In truth, under this contract, neither party was absolutely bound to receive as a valuer the nominee of the other: both possessed the right to have the intervention of a Court in the nomination of the valuers, and it's superintendence over the valuation.

In this view of the question, the cases quoted by Mr. *Wickham* are direct and explicit authorities in my favour. That parties may waive the exercise of their own judgment, and substitute the judgment of others, as to the price, or other constituent parts of a contract for the sale of property, is not denied. This substitution may be *specific*, as to the person or persons substituted, and the time and manner of giving their judgment; as in *Smallwood v. Mercer* and *Hansbrough*, 1 *Wash.* 290, and *Milnes v. Gery*, 14 *Vesey jr.* 400. Where this is the case, all the specifications must be strictly observed to make the contract binding; for the parties have assented to be bound, only in the mode specified. Or the substitution may be general, indefinite, or limited to certain classes of persons only; in which cases the Court may make the appointment. This principle prevailed in *Dandridge v. Harris*, 1 *Wash.* 326, and applies a *fortiori* in this case.

The case of *Graham v. Call* has no application.

But if *Baker* be not bound but by persons of *his own* choice, he is bound *here*; for the valuation was in fact made by such persons. He waived the privilege of nam-

NOVEMBER,  
1818.

Baker  
v.  
Glass,  
and  
Glass  
v.  
Baker.

ing valuers himself, and consented that those nominated by the Court should act. (1)

November 2nd 1818, Judge ROANE pronounced the Court's opinion, as follows:

Upon general principles, and on the authority of the case of *Milnes v. Gery*, 14 *Vesey jr.* 400, the Court is of opinion that there was, in this case, no such complete and concluded contract as the Court of Chancery ought to execute. The Decree is therefore to be reversed with costs, and the Bill dismissed.

*At the next term*, a motion was made for another argument of the cause; but the Court overruled the motion, "doubting, at least, it's right to re-hear a cause at a subsequent term, and thinking it best not to do it."

(1) Note. The Court of Chancery in the first instance, directed that the parties should, on or before a day specified, nominate one person each, as a valuer, and also a third valuer in case the two first should not agree; providing, at the same time, that if they should fail to nominate, the persons appointed by the Court should act: Afterwards, by consent of parties, so much of this order as gave them the time and privilege to choose valuers, was set aside, and the valuers appointed as aforesaid were ordered to proceed, with all convenient dispatch, to perform that duty.

Decided,  
Nov. 5th,  
1818.

## Paradise's administrators against Cole and Henderson.

1 Pending a suit against the Committee of an insane person, if the latter die, and a *scire facias* to revive the suit be issued against his administrators, who thereupon appear by Counsel, and go to trial, on the issue joined between the plaintiffs and the Committee; they cannot take objection in the appellate Court, that the suit ought not to have been revived against them.

A Suit at law was brought by the appellees, in the Hustings Court of Williamsburg, against *William M. Candlish* Committee of *Lucy L. Paradise* an insane person, who died after issue was joined. The appellants having administered on her estate, a *scire facias* was issued to revive the suit against them. The parties afterwards came by their Attornies; a jury was sworn to try

2. *Quere.* Whether a suit against the Committee of an insane person may not properly be revived against the administrators of such person, in the event of his dying during it's pendency?

the issue joined ; a verdict was rendered, and judgment thereupon, for the plaintiffs. The defendants appealed to the Superior Court of James City County, which affirmed the Judgment ; and then they appealed to this Court.

NOVEMBER,  
1818.

Paradise's  
administrators  
v.

Cole and  
Henderson.

(a) Edit.  
of 1808, c.  
101. p. 126.

*Leigh* for the Appellants. The *scire facias* was improperly issued, there being no provision for this case, in the Act of Assembly concerning abatements. (a) The suit being not against *Lucy L. Paradise* herself, but *William McCandlish* her Committee, it could not, when she died, be revived against her administrators.

*Call* for the Appellees. Upon the *equity* of the several Acts of Assembly on this subject, the suit was properly revived. But, if not, there should have been a *plea* in abatement to the *Scire facias*; instead of which, the administrators appeared, and went to trial without objection.

*Leigh* in reply. An express Act of Assembly was necessary to authorise a revival against an administrator *de bonis non*. Now this is a stronger case ; for a Committee does not stand in the same situation as an executor or administrator. The Committee is not bound to regard the dignity of debts : the executor or administrator is.

By the Court, the Judgment was affirmed,

## Pate against Bacon & Co.

Decided,  
Nov. 18th,  
1818.

IN assumpsit brought by *Edmund P. Bacon & Co.*, in the County Court of Botetourt, against *John Pate*, the Declaration did not state the names of the partners composing the firm of *Edmund P. Bacon & Company*. The defendant pleaded *non assumpsit*, whereupon a verdict

1. A declaration in behalf of a mercantile company, by the name of the firm, (without mentioning

the names of the partners,) is good after a verdict for the plaintiffs upon the general issue. See *Murdock & Others v. Herndon's executors*, 4 H. & M 200; *Scott & Co. v. Dunlop, Pollock & Co.* 2 Munf. 349; *Totty's executor v. Donald & Co.* 4 Munf. 430.

NOVEMBER,  
1818.

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Pate
v.
Bacon
& Co.

was found against him, and judgment entered, which the Superior Court affirmed. He then appealed to this Court.

Leigh for the Appellant, insisted that *Edmund P. Bacon & Co.* could not maintain their action, without setting forth in the declaration the names of the partners.

No Counsel appeared for the appellees.

By the Court, the Judgment was affirmed.

Decided,
Nov. 20th,
1818.

Bolling against Robertson and Wife.

1. A testator devised to his wife during her natural life, all his lands in one county, with the use of his negroes, stocks &c. thereon; and desired that all his negroes and stocks in two other Counties, be, the December after his decease, equally divided between his wife and only son. to be kept together and worked on his lands in those Counties, and the profits thereof to be equally divided between his said wife and son. He devised to his son and his heirs, the last mentioned lands, subject to the condition aforesaid, during the life of his mother; and, after sundry small legacies to his other children, devised to his son all the residue of his estate not before disposed of. It was held that the Wife was entitled to an *absolute* estate in a moiety of the slaves and stocks and their increase, in the two Counties last mentioned, together with a moiety of the profits (1) made on the said lands the year the testator died; besides a moiety of the subsequent profits as aforesaid.

(1) Note The word "*crops*" is used in the Bill; the word "*profits*," in the Decree.

"Island, both lying and being in the county of Gooch-land, and on my plantation in Powhatan called Hampstead, and the profits thereof to be equally divided between my said wife and my son William Bolling; the waggon and team and driver, to be kept up for the use of the plantation and to transport necessities to Cobbs, for my said wife, whenever she shall think proper to order it, but not to be considered as belonging to Cobbs." Another clause of his Will contains this provision—"I give and devise to my son William Bolling and his heirs, all my tract of land and plantation, known formerly by the name of Lickinghole, now called Bolling Hall, also my island and plantation called Hampstead, in the county of Powhatan, subject to the condition mentioned in the first clause of my Will, during the life of his mother. I also give and devise to my said son William and his heirs, all my lands in the county of Campbell, also two acres of land devised to me by my late father's Will, lying over the creek in the fork of Lickinghole and adjoining the said Bolling Hall Tract." After sundry small legacies to his other children, the testator adds—"All the rest and residue of my estate not already disposed of, I give and devise to my son William Bolling and his heirs; whom I constitute and appoint executor of this my last Will and Testament; and I desire that he may not be required to give security on the probate of this my Will, and that my estate be not appraised."

NOVEMBER,
1813.

Bolling

v.
Robertson
and Wife.

Mrs. *Bolling* died in November 1813, leaving a Will, by which, after a few pecuniary legacies, she bequeathed to her daughters *Elizabeth Robertson* and *Rebecca Murray* the residue of her estate, to be equally divided between them. *William Bolling* duly qualified according to law as her executor. The division of the slaves and stocks, as directed by the Will of *Thomas Bolling*, had not taken place during her life.

A Bill was filed in the Superior Court of Chancery for the Richmond District, by *William Robertson* and *Elizabeth* his wife and *Rebecca Murray*, against the said *William Bolling* in his individual character, as executor of

NOVEMBER,
1818.

Bolling
v.
Robertson
and Wife.

Thomas Bolling, and also as executor of *Betty Bolling*; the complainants claiming, as her residuary legatees, a moiety of all the slaves and stocks which were of the said *Thomas Bolling* at the time of his death, together with the increase of the females, one half of the *crops* of the said lands in Goochland and Powhatan for the year 1813, together with the hires and profits of their moiety of the said shaves and stocks, until the same should be given up to them; and also an account of the profits of the joint estate during the life of the said *Betty*.

On the 2d of July 1818, Chancellor TAYLOR decreed, (with a slight variation mentioned in the note,) according to the prayer of the Bill; being of opinion that in so doing, he "rejected that construction of the Will of *Thomas Bolling* deceased which would render utterly "useless, insensible and inoperative, that provision of the "said Will which directs that all the testator's negroes "and stocks in the Counties of Goochland and Powhatan, should be, the December after his decease, equally "divided between his wife *Betty Bolling* and his son "*William Bolling*, and gave such a construction to the "said Will as would render all it's parts sensible, consistent and operative." From this decree the defendant appealed.

Wickham for the Appellant. Nothing but a life interest was given to Mrs. *Bolling* in the negroes. They were bequeathed for a particular object only. Whenever the trust is for a particular object, the estate is to be construed as commensurate with it, notwithstanding the words used by the testator would extend farther. She had the *use* only; not even the *estate* for life. *Cujus est dare, ejus est disponere*. *William Bolling* was to have a right to a moiety; but *she* took only a *beneficiary* interest for a certain purpose.

The testator did not mean an equal division of the *slaves*, but of their *profits*. *Cui bono?* Why should he direct a *division* of the slaves, when they were still to be kept together and worked on his estate? The words, "equally divided, the December after my decease," were intended only to point out the time when the wife's

right to the moiety of the profits should commence. The time appointed for dividing the *stock* is the same. This shews that an *actual* division was not intended.

In construing a Will, words may be *rejected*, in order to give effect to the testator's intention. (a) The words, "equally to be divided," have been held as giving only a tenantry in common, not as requiring actual division.

The clause concerning the waggon and team fortifies my construction of the Will. The testator could not intend that the waggon and team should be divided: it was a *personal* privilege to the Wife, to continue during her life only.

Upon a *fi. fa.* against Mrs. *Bolling*, the Sheriff could not have sold any of the negroes to be carried off the plantation. So, in the case of an execution against an individual partner, the partnership property can not be sold, in any other manner than subject to the right of the other partners.

The *whole* Will must be taken together ; and, from the *context*, it appears, that no motive of conveniency or propriety could induce the testator to give his Wife an absolute estate in these negroes. His son was the principal object of his bounty. It is obvious he considered the negroes on the Goochland estate as not more than enough to cultivate it. Can it be doubted that, when he gave his son the land, he meant to give him the negroes also? No estate in *remainder* is given to the Wife, but *all the rest and residue* to the son. It is remarkable that, in all the devises to the Wife, he gives a life estate only; shewing his wish to keep the property together.

Leigh, for the Appellees. The testator, in the first clause of his will, gives his wife his landed estate in Chesterfield, called *Cobbs*, and the use of the slaves, stocks, &c. on that estate, *during her natural life*: thus evincing, that he well knew how to limit a *life estate*, when he intended one; that he knew the difference between giving the *use* of property, and giving the *property itself*; and that his attention was wide awake as to both those points. When, therefore, in the very next sentence, he directs, that his slaves, stocks, &c. in *Goochland* and *Powhatan*, shall be equally divided between his wife and his son

NOVEMBER,
1818.

Bolling
v.
Robertson
and Wife.

(a) *Dec v.*
Appling, 4
Term Rep.
82.

November,
1818.

~~~~~  
Bolling  
v  
Robertson  
and Wife.

William, without expressing what quantity or quality of estate either of them should take, can it be doubted, that he meant to give them both, an absolute estate in quantity and quality according to the legal import of the words? ; that, if he had intended to give his wife the *life estate* and the *use* only of *this* property, he would have so limited it in express terms?

Suppose this clause had stood alone; suppose there had been no residuary clause: would not the son have taken, by this clause, an absolute estate in *his* moiety? The same words must give the wife the same estate in *her* moiety.

If the testator had intended to give his wife a life estate only, in the moiety of the slaves, &c. in *Goochland* and *Powhatan*, why was he so particular in appointing the time when the division of that property should be made between the wife and the son? Why was a division directed at all? The will directs, *that it shall be equally divided between them, the December after the testator's death*. If the appellant's construction were correct; if a provision for the wife, *for her life only*, were here intended; no such division at any period would have been necessary. The direct, simple, obvious method of effecting the purpose attributed to the testator by the appellant, would have been, to give his wife, for her life, a moiety of the profits of the whole of those estates, lands, slaves, and all. It seems to me impossible to reconcile this very particular direction for a division, with an intention to give his wife only a life estate, and only the *use* of the property; a *life interest* in the *profits* of these slaves, &c., and not an *absolute estate* in a moiety of the *slaves themselves*.

In the principal devise to this favorite son, the testator gives him his *Goochland* and *Powhatan* lands, *subject to the condition mentioned in the first clause of his will during the life of his mother*; that is, to his mother's right to work her moiety of the slaves on those lands, and to receive a moiety of the profits of both lands and slaves. Here again, the same subject is brought to his mind; here again, we might expect a limitation of the interest he

NOVEMBER,  
1818.Bolling  
v.  
Robertson  
and Wife.

gave his wife, if such limitation was intended. But we find the interest given by the former clause to his wife, limited to a life estate with respect to the *lands* only, without any such limitation with respect to her interest in the *slaves*, &c. If it was intended, that the son should have all those slaves, &c. subject to the mother's life interest carved out of the son's absolute estate therein, why were not the *slaves*, &c. as well as the *lands*, given to the son, *subject to his mother's life interest therein*? The testator does here, in effect, explain the first clause of the will; referring to it, as giving his wife a mere life interest in the *lands*, but not as giving her a mere life interest in the *slaves*, &c.

It is argued, that the qualification, which limits the estate at *Cobbs* to the wife during her natural life, runs through the whole of that clause, and equally applies to and affects the estate given her in the *Goochland* and *Powhatan* slaves, &c. This is a point to be determined by simple inspection. It is not to be elucidated by argument. Such an interpretation violates, at once, all the grammatical and all the legal rules of construction.

It is thought highly improbable, nay impossible, that the testator should have intended to give his wife an absolute estate in *any* of his slaves or other personalty, and should have failed to give her such an estate in the *family servants*, *household furniture*, &c. at *Cobbs*, the place of his and her residence: he gives her *only a life estate* in *this* property: therefore, it is inferred, he could not have intended to give her *more than a life estate* in the *Goochland* and *Powhatan* slaves, &c. What were the testator's motives, it were as vain as it is needless to enquire. But it may be fairly supposed, that he had contracted a partiality for his family servants, his family pictures, his plate, even his furniture; and wished *that* property particularly to go to his favourite son, along with the family mansion, at his wife's death. It seems to me, indeed, more natural, that he should give his wife an absolute estate in the slaves on his distant estates in *Goochland* and *Powhatan*, than in the property at *Cobbs*.

NOVEMBER,  
1818.

Bolling

v.

Robertson  
and Wife.

If, as it is said, the wife took only a life interest in the *waggon and team and driver*, which are directed to be kept up, for the use of the plantation, and to transport necessities to Cobbs, for the wife's use, when she might think necessary to order it; this can only operate, at most, as an exception of the *waggon and team and driver* from the general effect of the preceding bequest. But it is remarkable, that the testator was careful to add, that *this waggon and team and driver should not be considered as belonging to Cobbs*. Why? If he meant, that the wife should have the same estate in the moiety of the *Goochland* and *Powhatan* slaves, as he had given her in those at *Cobbs*; if only a life estate was intended to be given her in both sets of slaves; it was immaterial, whether the *waggon and team and driver* were to be considered as belonging to *Cobbs* or to *Bolling-Hall*. This careful discrimination, therefore, fortifies the construction of the will, for which the appellees contend.

*Call on the same side.* The testator's intention is to be collected from his words, or by *necessary* inference from them. Speculative *suppositions* of what he *may* have intended, are not to be resorted to. The words, "*equally to be divided*," can not be got over, there being no other words in the Will to do away their effect. Why did the testator direct a division of the *slaves* as well as of the profits, if he meant a division of the *profits only*? Take Mr. *Wickham's* construction, and the testator gave all to his son, and nothing to his daughters.

*Wickham* in reply. Discarding nice grammatical disquisitions, the intention of the testator is evident, to give his wife a limited estate for a particular purpose. We are confined to that purpose, and not authorised to go beyond it. The expression of one object is the exclusion of another. She had an estate *for life* in the *Cobbs* estate: she had a qualified interest, or use, only, for the same time in the *Goochland* estate. In hundreds of instances, the words, "*equally to be divided*," do not signify an actual division; for instance, where a *single* slave is bequeathed to be equally divided. The testator never meant an equal division *in numero*, but to appoint the time when the equal interest of his wife and son in

moieties should commence. Why should he intend *two* divisions;—*first*, of the slaves, and *afterwards*, of the profits?

NOVEMBER,  
1318.

Bolling  
v.  
Robertson  
and Wife.

Words *may* be rejected, to give effect to a testator's intention: yet I do not contend for *rejecting* the words, "equally to be divided the December after my decease." Their meaning is, to express the right of the wife to an *equal* interest, and to fix the time for it's commencement.

BY THE COURT. the Decree was affirmed,

## Woodward against Woodson's heirs.

Decided,  
Nov. 24th,  
1818.

ON the trial of a Writ of Right brought by the appellees against the appellant in the County Court of Goochland, the demandants by their Counsel moved the Court to instruct the Jury, after being sworn, and *before evidence was introduced*, to render a special verdict in the cause; which motion being overruled, they filed a bill of exceptions.

1. It is not error for the Court to refuse to instruct the Jury, after being sworn, and *before evidence introduced*, to render a special verdict.

The defendant offered in evidence the deposition of *Joseph Payne*, which had been taken by a Commission, saving the right of excepting to his competency; to which evidence the demandants objected, because the "said deponent was one of the persons under whom the defendant pretended to claim; whereupon the defendant released any claim which he might or could have against the said deponent on account of any interest he has or had in the land in controversy in this action; it being also remembered by the Court, that, at a former trial of this suit, and before the taking of the said deposition, *Smith Payne*, of whom the defendant purchased, and under whom he immediately claims, tendered in the presence of the Court a release of all claim which

2. The deposition of a person, under whom the party claims in whose favour it is offered, is not admissible as evidence, unless it appear from the Deeds that no recourse can be had against the witness in case of eviction; and this though

a release to the witness be executed by such party, before the deposition is read to the Jury, *but after it was taken*; and though, at a former trial of the cause, before the deposition was taken, a release was tendered, in the presence of the Court, by another person under whom such party immediately claimed, of all claim which such other person might have, in any event, against the witness on account of the subject in controversy; the necessity of which release from that person was at that time agreed to be waived by the opposite party.

NOVEMBER,  
1818.

Woodward  
v.  
Woodson's  
heirs.

“ he, said *Smith Payne*, might have in any event against  
“ the said deponent on account of the land in controver-  
“ sy; the necessity of which release from the said *Smith*  
“ *Payne* to the said deponent was agreed to be waived by  
“ the demandants themselves; it appearing, also, that  
“ the said deponent had, about twenty seven years ago,  
“ purchased part of the land in controversy, of the said  
“ *Smith Payne* as excutor of his father *John Payne* de-  
“ ceased, which said part had been sold and conveyed by  
“ the said deponent to said *Smith Payne* individually, and  
“ that it was, in that way alone, the supposed interest of  
“ the deponent accrued:” but the demandants still insist-  
ing upon their exception, the Court overruled it, and per-  
mitted the said deposition to go to the Jury; to which  
opinion of the Court they, also, excepted.

Verdict and Judgment for the defendant. Upon an  
appeal to the Superior Court of law, this Judgment was  
reversed, because “the County Court had refused to di-  
“ rect the Jury to render a special verdict, when moved  
“ so to do by the appellants:” the verdict was ordered to  
be set aside, and the cause remanded for a new trial:  
from which judgment the defendant appealed.

*Call for the appellant.*

*Leigh for the appellees.*

The Court's opinion was delivered by Judge ROANE,  
as follows:

The Court is of opinion, that there is no error in the  
Judgment of the Superior Court of law, so far as it re-  
verses that of the County Court; but that the same is er-  
roneous in reversing that Judgment *because* a special ver-  
dict was not directed to be found; it not appearing, when  
that direction was asked for, that a special verdict was  
necessary or proper. The Court is further of opinion  
that there is error in the judgment of the County Court  
in admitting the deposition of *Joseph Payne* to be read in  
evidence, as (for all that appears to the Court) he was  
interested at the time his deposition was given, and, if  
the release in the Bill of exceptions mentioned would  
have made him competent, it came too late, being *after*  
*he was examined*. Both judgments are therefore revers-

ed; and the cause is remanded, with directions not to admit said deposition, unless it shall appear from the Deeds, (which are neither made part of the Bill of exceptions, nor of the record,) that no recourse can be had against the witness in case of eviction.

NOVEMBER,  
1818.

Woodward  
v.  
Woodson's  
heirs.

## Peggy and Mary against Legg.

Decided  
Nov. 25th,  
1818.

THIS was a suit for freedom in behalf of Peggy and Mary, filed against the appellee, in Loudon County Court. It was removed, by consent, to the Superior Court of law, where a case was agreed, shewing the following facts.

Peggy was the daughter of *Lucy*, a slave who belonged to *William Carr*, whose will, dated in January 1790, was proved in the County Court of Prince William in 1791; the testator having departed this life in Nov. 1790.

After bequeathing *Lucy* to his son *John Carr*, he added; "My will and desire is, that the negroes bequeathed to my dear children should remain with my dear Wife during her life, unless she should marry: in that case, my will and desire is, that my slaves should go immediately to those to whom they are devised, and that none of them be sold out of the families to whom devised; if offered for sale, by any of them, out of the family of my wife, my daughter and sons, that they be immediately liberated, and I do hereby desire they may be free to all intents and purposes."

*John Carr*, under the devise, had possession of *Lucy*, of whom, while in his possession, *Peggy* was born. He died intestate, and *Margaret Tebbs*, daughter of *Betsy Tebbs* who was the testator's daughter, came into possession of *Peggy*. *Margaret Tebbs* married *Thomas Triplett* who sold *Peggy* to *Nuthaniel Legg*, (a stranger

1. A testator, in the year 1790 bequeathed his slaves severally to his children, with a proviso, "that none of them be sold out of the families to whom devised; if offered for sale by any of them, out of the family of his wife, his daughter and sons, that they be immediately liberated." A son of the testator to whom a female slave was bequeathed, being in possession by virtue of the bequest, died intestate, and she came into the possession of a

granddaughter, by whose husband a child of the said slave was sold to a stranger, to be carried out of Virginia. It was decided that a right to freedom did not thereby accrue.

NOVEMBER,  
1818.

Ervine  
v.  
Dotton.

tion mentioned, was the property of the plaintiff, and that the other slaves were her children born after the said day. It appeared in evidence that, on that day, the plaintiff executed an obligation to the defendant, in the penalty of three hundred dollars, with a collateral condition, that whereas "the above bound *William Ervine* "hath this day bargained and sold a negro woman named *Dinah*, unto the above named *Andrew Dotton*, for "the sum of two hundred and seventy dollars; now, if "therefore the said *Dotton* shall well and truly pay the "said sum of two hundred and seventy dollars, and forty dollars a year, in property, half in salt, the other "half in goods, for the *hire* of the said negro woman, "until the whole sum shall be paid up to the said *Ervin* "for the two hundred and seventy dollars aforesaid; but "at any time, the said *Dotton* paying up the money "aforesaid, the *hire* of the negro shall cease; and, on the "said *Dotton* complying in the payments and tendering "the full amount of the money aforesaid, the said *Ervine* "shall convey a lawful right and title of the said negro "woman unto the said *Dotton*, his heirs &c., free and "clear from all claims whatever. *The title of the said Negro is in said Ervine until paid.* Then this obligation to be void, else to remain in full force."

It was also admitted that the slave *Dinah* in the declaration mentioned was the same mentioned in the condition of said obligation. The defendant's Counsel moved the Court to instruct the Jury that, by the said instrument of writing, the right of possession and of property of the negro *Dinah*, and her issue born after the date thereof, was to be vested in the defendant and that the plaintiff *Ervine* could not recover in this action. The Court so instructed the Jury, who thereupon found for the defendant; the plaintiff having filed a Bill of exceptions. Judgment was entered according to the Verdict; from which the plaintiff appealed.

*Leigh* for the appellant, insisted that the instruction given was contrary to the plain intent of the contract.

No Counsel appeared for the appellee.

The Court reversed the Judgment, and remanded the cause, for a new trial; with a direction that no such instruction be given to the Jury.

# Norvell against Camm and Wife and Warwick and Wife.

Decided,  
Dec 2d,  
1818.

AFTER the decision in favour of *Camm* and Wife and *Warwick* and Wife, in Ejectment against *Norvell*, reported in 2 *Munf.* 257—263, the latter brought a Writ of Right against the former for the same land. At the trial, the title-papers on both sides being exhibited, the tenants moved the Court to instruct the Jury, that the patent of the demandant was void, on the ground that the land thereby granted was not waste and unappropriated, and consequently not liable to be taken up by a treasury warrant; which instruction was accordingly given by the Court, and thereupon a verdict was found and judgment entered for the tenants; from which the demandant appealed to this Court. The case was argued before a Special Court of Appeals.

*Standard* for the appellant. It is not competent to a Court of common law to declare a patent void, upon the face of which there is no legal defect. (a) In such case, it can not be avoided, but by a regular and proper proceeding instituted for that purpose.

The case of *Noland v. Cromwell*, 4 *Munf.* 155, could never have come before the Court, as a case for equitable relief, but for the validity of this principle. A prior entry or warrant, it is true, withdraws the land from the class of waste and unappropriated; but it's being so withdrawn can not be given in evidence to vacate the patent, at law; as the cases of *Wilcox v. Calloway*, 1 *Wash.* 38—42, and *Jones v. Williams*, 1 *Wash.* 231, and

1. A Patent which is free from objection upon its face, can not be impeached in a trial at law, upon any evidence but that of a prior Patent remaining in full force.

2. If a petitioner for land forfeited by non-payment of quit-rents, under the 30th section of the Act of 1748, c. 1, failed to pay the consideration money, within six months after a Judgment in his favour, and to get a Patent as the law required; whereupon, another person obtained a Patent for the same land by vir-

tue of a treasury land warrant; such Patent is good at law, against a title derived from such Petitioner; unless the length of possession, of the tenant and those under whom he claims, accruing before the issuing of such Patent, be such as is sufficient to bar a writ of right.

3. *Quere.* Whether the tenant in such case could be relieved in equity?

4. *Quere.* also, whether the issuing of such Patent could be prevented by a *Caveat*, on the ground that the land, having been previously granted and settled, though forfeited by the original Patentee for non-payment of quit-rents, was not waste and unappropriated?

(a) *Witherinton v. McDonald*, 1 *H. & M.* 303; *Alexander v. Greenap*, 1 *Munf.* 134.



DECEMBER,  
1818.

Norvell  
v.

Camm and  
Wife and  
Warwick  
and Wife.

(b) *Will-*  
*cox v. Callo-*  
*way, 1 Wash.*  
*38—42;*  
*Norvell v.*  
*Camm, 2*  
*Munf. 257.*

the invariable course of the practice, and judicial decisions of his Country, fully evince. But

2dly, the land was such vacant and unappropriated land as was fairly subject to the demandant's grant and location. The right of *John and Charles Christians*, under whom the appellees claim, was a mere right of pre-emption, (b) subject to the condition of paying the consideration money within six months; which right was forfeited by non-compliance with that condition. Unless this were true, and the land thereupon liable to location, such right of pre-emption would become an absolute and indefeasible title. By the Act of 1779, (*Ch. Rev. 94,*) the lands of the Commonwealth were brought into market, with certain specified exceptions: the object was to raise money for the public Treasury, and prevent litigation: all surveys were required to be returned within twelve months, or the right of their owner to obtain a Grant would be forfeited. So, by the Act of 1786, c. 3. § 5, the surveys there mentioned were to be returned on or before the 1st of October 1788, or the land surveyed was to be vacant and liable to location. The parties entitled under *Surveys*, have not only the right that the *Christians* had, to wit, that of pre-emption, but they have also paid all that the Commonwealth can demand of them; yet their rights are by these laws subject to forfeiture, for delay in carrying them into grant; and yet it is contended that the right of the appellees is safe, though *nothing* has been paid, or done, by them, or those under whom they claim, since the judgment pronouncing the land to be lapsed! If this defence shall prevail, their right will be consummate to all intents and purposes without a grant!: the Commonwealth has granted the same land to the appellant, and his failure in this action will impart to them all the strength of his title.

*Wickham contra.* The true question in this case is, whether the patent previously issued did not take away the Commonwealth's right to grant the land again. If there be two Grants for the same land as waste and unappropriated, the right of the Commonwealth passes by the first, and the second is void, because *nihil operatur.*

So too, if an Individual sell land and convey, and afterwards convey to another person, the second Deed is void as a conveyance, because nothing passes by it. The land therefore could not be granted to *Norvell*; for it had been conveyed from the Commonwealth by a prior Grant. The case of escheated land, which can not be granted as waste and unappropriated, is similar to this.

(c) It is true that, in the case of *Alexander v. Greenup*, it appeared on the face of the patent, that it was a grant of escheated land; but in this case it appears that there was a former Patent; which circumstance equally prevents the granting of the land the second time.

Our right was secured by the Revolution; at the commencement of which, we were in possession. It depended on the Patent of 1755, under which the right of possession was transmitted to us. The case of *Jones v. Williams*, 1 Wash. 231, cited against us, is conclusive in our favour. Mr. Stanard says, that a right behind a patent, can not be exhibited at law; but, surely, if such right be a prior patent, it may. The true construction of the Act of 1748, is not that any person might enter for the forfeited land; but that it might be done, "upon the like terms and conditions," &c., by the petitioner, (in whose favour the judgment was,) and by no other person. No person could enter for it as waste and unappropriated.

In the case of *Norvell v. Camm*, 2 Munf. 257, this Court decided the very question now before ti. The appellees are lawfully in possession, and therefore entitled to judgment. In that case, *Camm and Wife* were plaintiffs, and recovered on their length of possession. Here they are defendants, and entitled to defeat the demandant on the same ground.

Stanard in reply. The whole amount of the decision in *Norvell v. Camm* was, that the plaintiff was entitled to recover in that action, (which was *Ejectment*.) upon twenty years' possession. The Court did not pretend to decide on the title. Judge ROANE, in his opinion, (if he does not positively say,) strongly intimates, that, if the question were on the mere right, *Norvell* would prevail.

DECEMBER,  
1818.

Norvell  
v.  
Camm and  
Wife and  
Warwick  
and Wife.

(c) *Alex-  
ander v.  
Greenup*, 1  
Munf. 134.

DECEMBER,  
1818.

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Norvell
v.
Camm and
Wife and
Warwick
and Wife.

Mr. *Wickham* has sedulously avoided meeting my argument. According to him, the mere *equitable* right of the Petitioner is converted into an absolute *legal* title. The Court, I insist, had no right to say that the Patent was void on the ground that the land was not waste and unappropriated. That question depended on evidence, not admissible *at law*.

When *Norvell* made his Entry and Survey, he gave notice to all the world. If *Camm* and Wife had superior equity, they should have interposed a *Caveat* against his getting a Patent; But they can not contend in a *Court of law* that *Norvell's Patent* should be overthrown by their mere *equitable* right.

Wickham. A *Caveat* against the Grant to *Norvell* was not necessary, as we claim under a prior Patent.

The Court's opinion was delivered by Judge ROANE, as follows:

This is a writ of right brought by the appellant against the appellees; the female appellees claiming as heirs of *Thomas Powell* deceased. The mise being joined on the mere right, and the case submitted to a Jury, an exception was taken to an opinion of the Court. The bill of exceptions states that, at the trial, the tenants exhibited, in evidence to the jury, 1st, a patent of 10 September 1755, to *James* and *John Christian* and *William Brown*, for 3926 acres of land; which is set out; 2dly, a judgment of the General Court, of the 29th of April 1774, retesting the title of the said land in the crown for the non-payment of quitrents; which was rendered on the petition of *John* and *Charles Christian*, and certifies that they had prosecuted their petition with effect; which judgment is also set out: 3dly, a Deed of bargain and sale, of 30th October 1777, from the said *John* and *Charles Christian* to *James Gressom*, for 983 acres of the said land; and 4thly, a Deed from said *Gressom* to *Thomas Powell*, of 21st August 1787, for 433 acres of the said land. The exception then states, that the demandant then introduced, as evidence of his title, a patent of 23 November '97, granted by the Governor of Virginia, for 669½ acres of land; and that it was admit-

DECEMBER,
1818.

Norvell

v.
Camm and
Wife and
Warwick
and Wife,

ted that this patent was for land lying altogether within the boundaries of the first patent, to *Brown and Christians*, and is part of the land mentioned in the said Judgment of the General Court, and covered several hundred acres of the land in controversy. The bill further states that, upon this statement of facts, the defendant's counsel moved for an instruction to the Jury that the patent of the demandant was void; assigning as his reason that the land thereby granted was not waste and unappropriated land, and consequently not liable to be taken up by a treasury warrant; which motion was opposed by the Counsel for the demandants, who contended that the same had become waste and unappropriated by the before mentioned judgment of the General Court; but the Court, being of opinion that the said land was not waste and unappropriated land, and therefore not liable to be taken up by a treasury warrant, instructed the jury that the demandant's patent *was void*: and the jury consequently found a verdict for the tenants, on which a judgment was rendered. *That judgment is now before us on an appeal.*

It is here to be remarked that *Norvell's* patent does not aver on its face that the land thereby granted was waste and unappropriated land. It is, however, entirely in the form prescribed by the land law, which form is silent in this particular. It states, however, that it is founded on a treasury warrant, and it will consequently be taken to convey waste and unappropriated land, if such only can be taken up by virtue of such warrants.

The patent is perfectly free from objection on its face; and, if it is to be impeached and rendered void, it can only be by means of extrinsic evidence. There is no difference in this particular between such evidence as arises from the admission of the parties, or from other sources. If testimony of the last description is not permitted to impeach a patent in a trial at law, neither can the first: the party must still recover on his patent, though he should admit facts, which, if they appeared on the face of the patent, might tend to vacate it. The principle interdicting the introduction of extrinsic evidence,

December,
1818.

Norvell

v.


Gamm and
Wife and
Warwick
and Wife.

at the time, and for the purpose aforesaid, is not to depend upon the grade of such evidence. The patent must still prevail in a trial at law, unless it is in fact a *fole de se*; unless it carries on it's own face the evidence of its nullity. While a patent of this last character is not to avail the party exhibiting it, (as has been decided in the case of *Alexander v. Greenup*,) it is equally clear that a patent, perfect on its face, is not to be avoided in a trial at law, by any thing short of an elder patent: it is not to be affected by circumstances of Equity, tending to shew that, in a *Caveat* Court, or a Court of Equity, the party relying on it would probably prevail. The jurisdictions of the two tribunals must be kept distinct, and the actual patent must prevail at law, although it may be made to yield to the superior right of the adverse party in another form. In the case of an actual and perfect patent, there is no remedy but to set it aside in a Court of Equity, or in some other proceeding having *that* for its direct end and object. It cannot be done in the ordinary progress of a trial at law, on evidence which the party had no means to know would be relied on, and therefore could not be prepared to meet. In other words, you cannot go behind a patent in a trial at law; the patent alone must prevail. These principles seem to us clear, and are fairly deducible from the case of *Witherinton v. McDonald*, 1 H. and M: they ought not therefore to be departed from. We cannot consequently judicially know the facts on which the appellees rely in this case: the principle aforesaid occludes the enquiry. And, if the case was even otherwise, we could not distinguish between this case and others. In this case, whatever be the character of the appellee's pretensions, they do not amount to a legal title. It is, in every view, best, that a perfect and solemn patent should prevail, except against an elder one, or unless it be impeached in a proceeding having for it's direct object the making it null:—it ought not thus to be assailed, collaterally, and by extrinsic evidence.

It is therefore not judicially known to the Court in this case, that the land conveyed by *Norvell's* patent is

not waste and unappropriated land; nor that it was ever the subject of a former grant. This precludes the necessity of our deciding whether, if this were otherwise, lands in the alledged predicament of this land could be taken up by a treasury warrant. The present impressions of most of the judges are that they are so liable. They are completely *revested* in the crown by the judgment of the General Court, and liable to be regranted to others, with a right of preference, on certain conditions, in the petitioner; and, as the former mode of acquiring lapsed lands is done away by the act of 1779, they must be liable to be taken up by treasury warrants, or not at all. These, however, are only the present impressions of most of us. The point is therefore left open for future and more solemn decision, when it may occur.

DENNIS,
1818.


Norvell
v.
Camm and
Wife and
Warwick
and Wife

The necessity, too, of a decision of this point, is probably not urgent, as cases of this description are gradually passing out of existence. With respect to the decision of a case, between the same parties, in this Court on a former occasion, we are of opinion that it does not interfere with or obstruct this decision. That case was in an ejectment; this in a writ of right. In that case, the Court went, or might have gone, on the ground of possession only: in this, the actual title comes in question.

On these grounds, we are of opinion to reverse the judgment, and award a new trial. On that trial, the evidence exhibited by the appellees is not to be admitted. As the instruction given by the Court was founded on evidence now interdicted by this Court, it would be superfluous to say that, on the new trial, that instruction is not to be repeated.

This is the opinion of all the judges, except Judge BROOKE. He requests me to state his dissent from the foregoing opinion.

Judge BROOKE has since furnished the reporter with an opinion stating his reasons for such dissent, as follows:

Judge BROOKE. My opinion in this case will be little more than a commentary on the one I delivered in the same case, when it was before this Court, in the

DECEMBER,
1818

Norvell

v

Camm and
Wife and
Warwick
and Wife.

form of an action of ejectment. In that action, the material facts in this were all before the Court. *Norvell* the appellant was then in possession of the land in controversy, and claimed under the patent on which he now relies; the judgment of the inferior Court was against him, and he appealed to this Court, where, after long and deliberate consideration, aided by a very elaborate and able argument on both sides, it was affirmed, and the appellant turned out of possession. Upon a correct view of the facts in that case, it is impossible to mistake the grounds of the decision. If the Patent to *Norvell* availed any thing, the Court would have found nothing in the 26 years' possession of his adversaries, and of those under whom they claimed, on which, even in an action of ejectment, to found the judgment then pronounced; for if the right to grant the land as waste and unappropriated was in the Commonwealth at the date of the Patent to *Norvell*, the maxim *nullum tempus* applied as to the Commonwealth in its full force, and the right of *Norvell* to the possession under the Patent must have overcome the pretensions of the lessors of the Plaintiff. In other words, if the title to the land, as waste and unappropriated, was in the Commonwealth until the date of the Patent to *Norvell*, the anterior possession of the plaintiff in ejectment, being much less than twenty years, gave no right to the possession against *Norvell*, who claimed under the Commonwealth. To have considered the Patent valid, that is, a grant of the land in question, as waste and unappropriated, by the Commonwealth, and then to have pronounced judgment against him on the ground of the naked possession of the plaintiff, of land of that character, would have been impossible. The Court then, as a preliminary to an enquiry into the title of the Plaintiffs, must have considered that no title passed, by the Patent to *Norvell*, to the land in question, on the ground that it was not waste and unappropriated, and therefore not comprehended by the Patent, which, reciting the treasury warrant on which it was founded, could convey land of no other description in pursuance of the Act of 1779. That this was the opinion of the

Court, necessarily results from what was said on the title of the Plaintiffs; and, if I am correct in this, an opinion of the Court in the present case that would reverse the grounds of it's former opinion, in a case between the same parties, and depending on the same facts, will be a novelty of which we have no example.

But, upon the merits, the former decision of this Court was correct. The plaintiffs in ejectment, and the appellees now before the Court, held an estate upon condition, under the judgment of the General Court, founded on the petition of those under whom they claim. The legal title was revested in the Crown by that judgment, to be transmitted to them upon the performance of the conditions therein mentioned. On the failure to perform the conditions, no forfeiture could be pronounced in behalf of the Commonwealth (on which the rights of the Crown have devolved) except by the General Court or some other tribunal substituted by law.^(a) The right to a grant under that judgment, is not limited as to time by the Act of 1748, in pursuance of which it was rendered. Upon principle, a forfeiture could not, by the register of the land office, and the Governor who executed the Patent to *Norvell*, be pronounced; and, if it could, land before patented and forfeited would not be converted into waste and unappropriated land, to be located upon a treasury warrant under the Act of 1779, if the Act of 1748 has expired, as was insisted on. The right of the Commonwealth ought to have been judicially asserted. The error is in supposing a case of this description analogous to the cases arising out of claims to waste and unappropriated lands under the Act of 1779. The right to a grant for any specific land of the last description, in preference to another claiming the same right, could only be decided in a Court of *Caveat*, (under the authority of *Johnson and Brown*, and *Noland v. Cromwell* in this Court,) until such land was granted to some one, as the land in question had been to the *Christians*. The right to appropriate it in exclusion of another claiming that right, gave no equity against the Commonwealth. There being no contract express or implied on which to bottom

DICKINSON,
1818.

Norvell
v.
Camm and
Wife and
Warwick
and Wife.

(a) See
the Act of
1748.

DECEMBER,
1818.

Norvell
v.
Gamm and
Wife and
Warwick
and Wife.

an equity, it gave no equity *ex-contractu* against another claiming the same right. The Act of 1779 only holding out the right to any citizen to appropriate waste and unappropriated land, on the terms of that Act, without a compliance with which no right accrued; if the party failed to consummate his right by not pursuing the provisions of that Act, and another more diligent obtained a grant, he had no claim upon the Commonwealth, except to another warrant with which he might take other lands: it gave no equity to any one, in preference to another. Until the claim to appropriate had been carried into a grant, the land did not take the character of property; and all controversies, between parties claiming the right to appropriate such land under the Act, were to be tried in the Court of *Caveat*. On these principles, the cases referred to were decided, which cases only permit such parties to come into a Court of Equity on the ground that they had been kept out of the Court of *Caveat* by fraud, accident, or mistake. If they had any general equity *ex-contractu* either against the Commonwealth or a party contesting the right, these decisions could not be supported, because the remedy would have been considered as cumulative. The case now before the Court differs then from those cases in this, that the land in question had been, before the grant to *Norvell*, appropriated by a grant to the *Christians*. The declaration in the Act of 1748, that, upon the failure of the party to perform the condition of settling, &c. after the Patent had issued, did not convert the land into waste and unappropriated land: it had been appropriated by the grant, and the Act of 1748 gave the title back to the Crown upon failure to perform the conditions required by it, to be adjudged in the General Court, upon the petition of some other person for the land lapsed. Before such adjudication in the General Court, or some other pointed out by law, no forfeiture could accrue, nor could the title revert in the Crown, nor in the Commonwealth, since the rights of the former devolved upon the latter. Indeed, under the 30th section of the Act of 1748, unless the petition was within ten years from the date of the

Patent, the title was confirmed to the Patentee, as if he had performed all the conditions:—the land could never be recovered. The right of the appellees is now to a grant from the Commonwealth, not for waste and unappropriated land, but for land once the property of the *Christians*, and adjudged to the petitioners, under whom they claim, by the judgment of the General Court. For all that appears in this case, the conditions on which the appellees have a claim to a Patent from the Commonwealth, may have been performed; and yet that right is to be divested by the officers of the Commonwealth authorised to issue patents, if the Court decides that the Patent to *Norvell* is conclusive evidence that the land in question was waste, &c. when that Patent issued. As to the ground that a Court of law cannot declare void a Patent for any thing not apparent on the face of it, that objection does not occur in this case. On the face of the Patent, it is for waste and unappropriated land: it was issued by virtue of a treasury warrant, on which no other description of land could be located according to the acts on the subject. The first enquiry is, does the Patent pass the commonwealth's title to the land in question? In every case, before a party can recover by virtue of a grant, the land claimed must be shewn to be the land granted. If no land can be found as described in the Patent, it passes nothing. If, upon the face of the Patent, (as in the present case,) the land demanded by the party is not the land intended to be conveyed by the commonwealth under the law of the commonwealth, whatever may be his rights under it, they do not attach upon the land in question. In coming to that conclusion, it is not necessary to vacate the Patent: it is only necessary to decide that the land in controversy, having been before granted by the Crown, is not waste and unappropriated land, within the meaning of the treasury warrant, in virtue of which it was entered and located, as is recited in the Patent itself. This result is arrived at without going out of the Patent to ascertain the rights of the Patentee in relation to the commonwealth, but is deducible from the facts in the special verdict in relation to the

DECEMBER,
1818.

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Norvell  
v.  
Camm and  
Wife and  
Warwick  
and Wife,

DECEMBER,  
1818.

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Norvell

v.

Camm and
Wife and
Warwick
and Wife.

title of the appellees, opposed to the facts disclosed by the Patent itself. The question, whether the commonwealth has a right to grant the land of any citizen, ought not to be concluded by the Patent in a trial at law, on which it appears that the right to grant was not in the commonwealth under the law in pursuance of which the grant is professed to have been made.—That Courts of Equity are more competent to investigate the merits of a claim to a grant, in behalf of the grantee, in a controversy with the commonwealth, in which at law the grantee might insist that the latter was estopped by it's deed, I have no doubt; but, in a controversy with a party claiming to hold the land under the law of the commonwealth, in preference to another, who, under his Patent upon the face of it, has no title to land before patented, I conceive the question of estoppel does not arise. A Patent for waste and unappropriated land cannot conclude a party, holding land of a different description, to shew that fact, any where. In the case of waste and unappropriated land, a failure to perform what was required by the act of 1779 before a Patent issued, could not be considered as a *forfeiture*, but an abandonment of the claim to appropriate the land entered; and the right of the commonwealth to grant the land to another, who had complied with the terms of the Act of 1779, accrued.

But the right of the Commonwealth to grant land before granted, on the ground of a forfeiture, as in the present case, could not accrue until that right was judicially ascertained. Under the act of 1748, in relation to lapsed lands before patented, no right was reserved to the Crown to claim as for forfeiture, on the nonperformance of the conditions prescribed by the judgment of the General Court, as in this case. It's only security, under that act, for the performance of the conditions on the part of the petitioners, was that, in the event that the conditions were not performed, some other person would again petition to have a grant for it on the same terms, and would *Caveat* the person claiming a grant, on the ground that he had not performed the conditions prescribed by the judgment of the General Court. This

security devolved on the Commonwealth; and it had the right to grant the land on no other terms under the act of 1748. Under that act, the appellees have a claim of higher grade than a claim to waste and unappropriated land, which might, as before said, be abandoned at any time. As well might it be said, that a patent would at law pass escheated land, though, upon the face of it, it was issued upon a treasury warrant, for waste and unappropriated land, in direct contravention of the act which prescribes the mode of acquiring title to such land from the Commonwealth. Under such a construction, the Commonwealth, in consequence of the mistakes of its officers in issuing such patent, would be compelled to resort to a Court to avoid its own patent, or lose land never intended by the law to be granted, and of ten times the value of waste and unappropriated land, which it intended to grant. Upon the whole, I am of opinion the judgment of the Superior Court ought to be affirmed.

NOVEMBER,
1818.

Norvell

v.
Camm and
Wife and
Warwick
and Wife.

Galt and Garland against Carter.

Decided,
December 2,
1818.

This was a suit in the Superior Court of Chancery for the Staunton District, brought, originally, in the names of *Charles Carter and Edward Carter*, trustees for certain

1. In a devise of a plantation and the slaves upon it, to trustees

for the support of the son of the testator, and of the wife and children of that son, by means of the profits thereof; *quare* whether the testator's omitting to insert the names of the slaves, or to describe them in any other manner than as the slaves on the said tract of land, be such a circumstance as would subject them to the claims of creditors?

2. Upon a Bill of Injunction to prevent the sale, under execution, of slaves devised in trust, if the defendants alledge that the *cestuy que trust* was entitled to the slaves by five years possession before the death of the Devisor; and the truth of such allegation be doubtful on the evidence; the Chancellor ought to direct an issue to ascertain that fact. See *Marshal v. Thompson*, 2 *Munf.* 412; *Bullock v. Irvine's administrators*, 4 *Munf.* 460.

3. If the powers of Trustees suing in Chancery be vacated, pending the suit, upon a bill filed against them by their *cestuy que trust*; and other trustees be appointed; it seems that the Court may change the plaintiff's after answer filed, upon terms, of the new trustee's paying the costs already incurred and giving security for future costs; but it cannot vacate an Injunction bond given by the original trustees, and direct another to be executed, without previous notice to the defendants, that they may shew cause against the motion.

DECEMBER,
1818.

Galt and
Garland
v.
Carter.

purposes appointed by the Will of *Edward Carter* deceased, against *William Galt* and *David S. Garland* his agent, to prevent by Injunction the sale of certain slaves, devised to the said trustees, which had been taken in execution to satisfy a Judgment, obtained by *Galt* as a creditor of *John C. Carter*.

The clause in the Will creating the trust, was as follows: "Item, I give and bequeath unto my sons *Charles Carter* and *Edward Carter* all that part of my tract of land in the County of Amherst which lies on the East side of Piney River, whereon my son *John* lives, together with the slaves and plantation utensils on the said land; to have and to hold the said Land, Slaves, Stock and Plantation Utensils, unto the said *Charles Carter* and *Edward Carter* and their heirs forever: In Trust, nevertheless, to and for the following uses and purposes; that is to say, for the purposes of supporting, with the profits of said estate, my son *John Carter* and his wife *Apphia Carter* and their children, during the life of the said *John Carter* and *Apphia Carter* and the longest liver of them, and, after their deaths, in trust to be equally divided among the children of the said *John* and *Apphia*, then living, and the legal descendants of such as are dead, *per stirpes*."

The slaves taken in execution were a negro woman alleged by the Complainants to have been one of the slaves on the plantation, mentioned in the said clause, at the time of the testator's death, and several children of her's born since that time. It appeared that the trustees had never taken possession of the slaves so devised to them, but left them in the possession and under the control of *John C. Carter*.

It was contended by *Galt* and *Garland*, that, under the Act of Assembly concerning estates holden in trust (Edit. of 1794, 1803 and '14, c. 90. s. 15,) the slaves in question, (if in fact the woman *Jenny* belonged to the testator at the time of his death, and was comprehended in the devise,) were subject to the debts of *John C. Carter* the cestuy que trust. If not, yet the particular debt, in this case, having been contracted for goods necessary

and proper for the support of the said *John C. Carter* and his wife and children, the slaves were liable in equity to satisfy that debt; especially as *John C. Carter* was enabled, through the negligence of the trustees, to contract debts, upon the credit he obtained in consequence of having those slaves in possession and holding them as his own. But it was also alledged, that *John C. Carter* had obtained a complete title to the same slaves, by five years possession before the death of the testator, who, therefore, had no right to devise them.

The motion to dissolve the Injunction was overruled, and an order made, that an issue be tried, "to ascertain whether the woman *Jenny* mentioned in the Bill and Answers, was one of the slaves devised," as aforesaid.

After this, the Court, by a decree pronounced upon a bill filed in behalf of *John C. Carter* and wife, and their children; against the plaintiffs in this cause, for the purpose of superseding them as Trustees and substituting another, and upon the answer of the present plaintiffs to that bill, vacated the powers of the said original trustees altogether, and appointed *Hill Carter* Trustee in their stead; whereupon they, together with the said *Hill Carter*, moved the Court to admit him as plaintiff in this cause, and to dismiss them out of Court. They also moved the Court for leave to supersede and vacate the Injunction Bond given by one of the said plaintiffs, upon filing with the Clerk of the Court of Amherst County, in lieu of that bond, another injunction bond, with sufficient security: it being the object of the said *Hill Carter* to use the evidence of the said plaintiffs on the trial of the issue before directed. The Court having heard the arguments of Counsel on both sides, decreed that, on the said *Hill Carter's* paying into Court the costs which had been incurred by the defendants, and on giving bond and security in Court, in the penalty of \$200, conditioned for paying to the defendants all costs which might thereafter accrue to them, he should be admitted plaintiff in the cause, in lieu of the present plaintiffs; and the issue directed as aforesaid, should be made up between him and the defendants; and also that, upon his giving a new In-

DECEMBER,
1818.

Galt and
Garland
v.
Carter.

December,
1818.

Galt and
Garland
v.
Carter.

junction bond with sufficient security, and filing the same with the Clerk of the Court of Amherst County, the bond before filed should be vacated, and delivered up to the obligors to be cancelled. The question of competency, should the present plaintiffs be introduced as witnesses on the trial of the issue, was left open, and the defendants at liberty to offer any legal objection to their testimony.

On the trial of the issue, before the Superior Court of Amherst County, the plaintiff offered the said original plaintiffs and trustees, as witnesses, to which the defendants objected, but the Court overruled the objection and admitted them; whereupon a Bill of exceptions was filed.

The defendants moved the Court to instruct the Jury, that, if they believed from the evidence that *John C Carter* was in peaceable and undisturbed possession of the slave Jenny for the space of five years previous to the death of *Edward Carter* deceased, they ought to find that the said slave Jenny was not devised by the Will of said decedent; which instruction the Court refusing to give, the defendants filed a second bill of exceptions.

The Jury found that the negro woman Jenny, mentioned in the issue joined, was one of the slaves devised in trust, as before mentioned; and, the verdict being certified, Chancellor BROWN made the Injunction perpetual; without prejudice to the right of the defendants to levy their execution on any property, belonging to the said *John C. Carter*, other than the property held by the plaintiff as Trustee as aforesaid.

From this decree, the defendants appealed.

Wickham for the appellants.

My first objection to the proceedings is founded on a defect in the devise itself, in which the description of the slaves is too uncertain to make it good against creditors. Their names should have been mentioned, that the creditors might know on which slaves to levy executions.

Such a devise enabled *John C. Carter* to hold out false colours, to the deception of those who trusted him.

2. After the Bill and Answers filed, the Court had no

right to change the plaintiffs. The suit should have been dismissed, and a new suit brought. No new bill was filed by *Hill Carter*. The Court therefore exceeded it's powers.

DICKINSON,
1818.

Galt and
Garland
v.
Carter.

3. The trustees were not competent witnesses.—The whole question turns upon their negligence, in not interfering, but permitting *John C. Carter* to act as he pleased. They were liable to an action for gross and palpable breach of trust, if *Galt* recovered; and, therefore, were directly interested to defeat his claim.

4. The terms of the issue were, perhaps, too narrow, in confining the enquiry to the question whether the slave *Jenny* was comprehended in the devise in trust. If the issue was not too narrow, the Judge ought to have admitted the evidence offered to shew *John C. Carter's* title independent of the Will.(a)

(a) *Gay v.*
Moseley, 2
Munf. 543.

5. Upon the merits of the case, appearing from the depositions filed, the Chancellor ought not to have made the Injunction perpetual, but should have dismissed the Bill. No Counsel appeared for the appellee.

Judge *Roane* pronounced the following opinion of this Court.

The Court is unwilling, without necessity and on full argument on both sides, and deliberation, to decide a most important question made and occurring in this case; namely, whether the omission of the testator to describe the trust negroes by name, or by any other description than that of *being on a certain tract of land*, is such a circumstance of negligence or omission, as would, in favour of creditors, subject the said negroes to their claims. On the one hand, it would be easy, (as negroes have names,) to describe them by those names; thus affording a better criterion for the government of creditors than the one before us: it is also clear, that a description of this kind is well calculated to enable a fraudulent donee to cover more property than is actually conveyed under the description. On the other hand, it is questionable, whether a description which is entirely competent to convey the property to the donees, and is very usual, should be held incompetent so far as it respects creditors, on account of its tendency to let in frauds. The question is not without difficulty, and in its consequences, may be

DECEMBER,
1818.

Galt and
Garland
v.
Carter.

very important. We leave it therefore open for future discussion and decision, when it shall hereafter occur.

In the case before us, the issue directed by the Chancellor, and actually tried, seems restricted, to the fact whether the slave *Jenny* was one of those on the plantation mentioned in the Will of *Edward Carter*; and, being thus restricted, the opinion of the Judge who tried that issue, and which rejected evidence tending to shew that *John C. Carter* had acquired a property in the slave by means of a five years possession, was not erroneous. That enquiry was not submitted to the Jury by the issue. But, that fact being put in issue by the answers; and it being at least *doubtful* on the evidence; we are of opinion that the issue should have been extended to embrace that enquiry also; and, that there is error in the decree in not having made such extension; it being extremely clear that, if such possession did exist in *John C. Carter* for five years before his fathers death, it vested the property in him, as to his creditors.

The Court is also of opinion, that, admitting the power of the Court of Chancery to change the plaintiffs in this suit, for the purpose of making them competent witnesses, upon the terms stated in the proceedings, the Injunction bond, previously given in this case, should not have been decreed to be given up and cancelled, and another substituted in it's room, without *notice* duly given to the appellants of such intended substitution; in order that they might, if they pleased, shew cause against it; and that, for want of such notice, the said bond was irregularly ordered to be cancelled. The decree is therefore to be reversed, and the cause remanded, that the proceedings may be reformed in these particulars, and the cause proceeded in, to a final decree.

Rootes against Holliday and Welch.

Decided,
Dec. 10th,
1818.

THIS case is fully stated in the following able opinion of Chancellor CARR of the Winchester District, pronounced the 8th of July 1814, upon a Bill in which *Thomas R. Rootes* was plaintiff and *William Holliday* and *James Welch* were defendants.

"This is a bill, in the common form, to foreclose a mortgage executed by the defendant *Welch* to the complainant. The defendant *Holliday* is stated by the bill to be a purchaser with notice of the incumbrance. By an amended bill, it is stated that the defendant *Holliday*, at the time of his purchase, to indemnify himself, required and received of *Welch* a conveyance of sundry property lying in the western parts of this State. The defendants are called on for a particular answer to this fact. (1) The defendant *Welch* states, that he never intended to mortgage to the complainant the land sold to the other defendant; that the mortgage was meant to comprehend certain military lands; that, having confidence in the complainant, he did not read over the mortgage before signing, and thus did not discover the fraud."

"I consider this answer as disproved; and, therefore, shall take no farther notice of it. The defendant *Holliday* stated the particulars of his purchase; that the other defendant, in December 1799, applied to him to buy the land; that he shewed him a deed from *Rootes*, first, together with an open letter from him to Mr. *E.* under him, put the deed into the hands of the vendor, that he may it for the purpose of having it recorded; such delivery is not a surrender of the title under the deed."

3. Upon a Bill to foreclose a mortgage, against the mortgagor and a purchaser from him, the plaintiff filed an amended Bill stating that the latter, at the time of his purchase, received of the mortgagee a conveyance of sundry other lands; and praying a discovery thereof, and general relief; but without any special prayer that these lands be subjected to satisfy the plaintiff's claim. It appearing that the mortgage was not duly recorded, and the purchaser not chargeable with notice; a decree dismissing the Bill altogether; was affirmed; but without prejudice to the plaintiff's right to proceed against such other lands.

(1) Note. Nothing was said in the amended Bill about a decree against these lands, to satisfy the plaintiff's claim: but there was a general prayer for relief.

1. Under the Act of 1792, (edit. 17: 4, 1803 and '14, c. 90. § 4,) a mortgage, not recorded within eight months from its date, was void against a bona fide purchaser for valuable consideration, who had no notice thereof, when he made the purchase, paid his money and got his deed; notwithstanding he had actual notice before the eight months from the date of the mortgage had expired.

2. If a purchaser to whom a deed has been fully executed, or one claiming

DACUMEN,
1818.

Rootes

v.

Holliday and
Welch.

Smith, in which are stated the sale to *Welch*, and the receipt of the money (1200*l.*) from him, and directing Mr. *Smith* to deliver possession, &c.: that, seeing every thing thus fair, he bought the land for about 1100*l.*; paid 100*l.* in cash; gave his bonds for 250*l.* and a house and lot in Winchester for the balance; and, at the same time, received a deed from *Welch*: that, some time after this, on sending the Deed, from *Rootes* to *Welch*, to Fredericksburg to be recorded, he was informed, for the first time, that the complainant had a mortgage; that it was now too late, to retract from the purchase; for he had paid the 100*l.*, conveyed the house and lot, which had been again sold and conveyed; and his bonds had been assigned away by *Welch*, and some assumed to the assignees. He expressly denies notice, of the plaintiff's *lien*, before his purchase and payments. In answer to the amended bill, he denies that, at the time of his purchase, payment, and receiving a deed from *Welch*, he took any conveyance of lands as an indemnity against the claims which might exist to the land bought of him; because, at that time, he had not the slightest suspicion that any such claims did exist; but that, some time after, hearing a rumour which made him fear that the complainant might have a *lien* on it; and seeing *Welch* denied it: he then asked *Welch* if he could give him any security for the title; who offered him, as the only security in his power, mortgages on lands in Berkeley and Hampshire. These the defendant took, and had them recorded; but, being informed that the lands were of little value, and *Welch's* right to them very doubtful, he has taken no farther step in the business, and is willing that the Court, if it thinks proper, should decree to *Rootes* all benefit arising from these liens. The Deed from *Rootes* to *Welch* is dated 12th December 1799; is acknowledged by *Rootes*, 14th May 1800, before the District Court holden at Fredericksburg, where *Rootes* lives, and recorded in Frederick County Court, 1st September 1800. The mortgage from *Welch* to *Rootes* bears equal date with the Deed; is proved by the subscribing Witnesses before the Fredericksburg District Court, 14th May 1800, certified and recorded in Frederick County Court, 1st September 1800. *Welch* is stated, in

the bill and some of the mortgages, to be a resident of Greenbrier. The Deed from *Welch* to *Holliday* bears date 29th January 1800, and is recorded the succeeded February. The depositions of *Hugh Holmes*, *Edward Smith*, and *Richard Holliday*, prove the open letter and it's contents, but do not speak of it as containing an acknowledgment that *Rootes* had received the price of the land. *Holmes* farther states, that he examined the title papers then in *Welch's* possession; and, though he had no confidence in *Welch's* integrity, he was so well satisfied of his title, that he made him several offers for the land, and would have bought if they could have agreed. *Holliday* states his belief that the title papers, conveying the claim from *McDonald* to *Welch*, were in *Welch's* possession. They are not in the record, except a Deed from *Holmes* and wife to *Farish*."

DECEMBER,
1818.
Rootes
v.
Holliday and
Welch.

"This is a concise statement of the case, made by the Bill, and Answers, and the evidence in support of it. The only questions necessary to be discussed, grow out of the mortgage from *Welch* to *Rootes*. This, it will be seen by the dates, was not recorded until after the eight months (within which Deeds are required by the Act of Assembly to be recorded,) had expired. It is contended by the Counsel for the defendant *Holliday*, that he being a *bona fide* purchaser for valuable consideration without notice, the mortgage is void as to him; it not having been duly recorded. The Counsel for the Complainant, in the very ingenious and imposing argument delivered, and in the notes submitted, has rested his Client's cause on three points. He contends, first, that *Holliday* is a purchaser with notice; and that, therefore, as to him, the mortgage will be held good by a Court of Equity without recording;—2dly, that, *Holliday* having purchased, and received his deeds, before the expiration of the eight months within which the mortgage might have been recorded, the reason of recording as to him ceased, and, therefore, it will not be required by this Court in support of the mortgage:—3dly, that, by the delivery of the Deed (from *Rootes* to *Welch*) into the hands of *Rootes*, to be acknowledged for record, the defendant *Holliday* divested

DECEMBER,
1818.

Rootes
v.
Holliday and
Welch.

himself of the legal estate in the land; which was, by the same Act, revested in *Rootes*; that his subsequent acknowledgment of the Deed was a re-execution of it, to all intents and purposes, by which *Welch's* title was revived, but *Holliday's* not; and that, although it should be supposed that this hypothesis destroyed also the mortgage to the complainant, yet, as the title to the land is still in *Welch* the vendee, it ought to be held liable for the purchase money; and, on this ground also, the Bill must be sustained. Let us take up these points in order."

"1st, As to notice. The Bill charges it: the Answer denies it positively; and there is no evidence of it in the cause. Indeed, it was not contended that there was *actual* notice, but that there were circumstances attending the transactions sufficient to put a prudent man on enquiry, and therefore sufficient to affect *Holliday* with constructive notice. It is certainly a rule in Equity, that whatever is sufficient to put a party on enquiry amounts to notice. I do not think, however, that the circumstances relied on here, are of that character; but this is a part of the subject which I shall not consider particularly, as I am of opinion that this is of that class of cases not open to constructive notice at all. There is a very strong resemblance (as it regards the recording of Deeds and Mortgages,) between the 4th section of our Act "for regulating conveyances," and the Statute of 7 Ann. c. 20, commonly called the Register Act. By our Act, (after directing the mode of recording,) it is said; "that all Deeds of Trust and Mortgage whatsoever, which shall be hereafter made and executed, shall be void as to all creditors and subsequent purchasers, unless acknowledged, or proved, and recorded according to the directions of this Act." The British Statute, after describing the kind of conveyances to which it extends, and saying that they shall be registered in the manner directed by the Act, adds, "that every such deed or conveyance, that shall, at any time after, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such memorial thereof

"be registered, as by this Act is directed, before the registering of the subsequent Deed or Conveyance." The Acts being thus similar, let us enquire what have been the English decisions on the subject."

DECISION,
1818.

Rootes

v.

Holliday and
Welch.

"In *Newland on Contracts*, 509—10, it is said, "that, although the registry Acts declare that an unregistered deed shall be void against a subsequent purchaser whose deed has been registered, yet Courts of Equity have decided that, if the subsequent purchaser had notice of the prior unregistered deed, he ought not to prevail against the precedent conveyance; for it plainly appears to be the intention of the Acts to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances: therefore, where a person had no notice of a prior conveyance, there the registering his subsequent conveyance entitles him to prevail against the prior conveyance; but, if he had notice of it, then it was not such a secret conveyance by which he could be prejudiced: it is however to be remarked, (he adds,) that, in these contests between persons claiming under unregistered and registered Deeds, Equity will not relieve against the legal estate, which the subsequent purchaser has obtained by registering his Deed, unless (in the words of Lord HARDWICKE) in the case of apparent fraud, or clear and undoubted notice; but suspicion of notice, though strong suspicion, is not sufficient to justify the Court in breaking in upon an Act of Parliament." Read also *Sugd. Law of Vendors*, 471—2; 3 *Vesey jr.* 478, *Jolland v. Stainbridge*:—Lord ALVANLEY says, "I must admit now that the registry is not conclusive evidence; but it is equally clear that it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed; and, knowing that, registered in order to defraud them of that title he knew at the time was in them." He adds, "I regret that the Statute has been broken in upon by parol evidence; and am very glad to find Lord HARDWICKE, in *Hine v. Dodd*, (2 *Atk.* 275,) says, that nothing short of actual fraud

DECEMBER,
1818.

Rootes
v.
Holliday and
Welch.

"will do."—In 3 *Atk.* 646, *Leneve v. Leneve*, Lord HARDWICKE, speaking on this subject, says, (after reviewing several decisions,) "Consider what is the ground of all this, particularly in those cases which went on the foundation of notice: the ground of it is plainly this, that the taking of a legal estate after notice of a prior right, makes a person a *mala fide* purchaser; it is a species of fraud and *dolus malus* itself; for he knew that the first purchaser had the clear right of estate, and after knowing that, he takes away the right of another person by getting the legal estate."

Authorities might be multiplied; but these are abundantly sufficient to shew that Courts of Equity interfere in these cases upon the ground of fraud; and that nothing but clear proof of actual notice will authorize them to break in upon a positive Statute. These decisions appear to me to apply with increased force to our own Act, which, it will be observed, makes a marked distinction between absolute Deeds and Mortgages. The first if not duly recorded, it says shall not be good against subsequent purchasers, *not having notice thereof*. The latter, it declares *void against subsequent purchasers*; omitting the words, "*not having notice thereof*." Upon the first point, therefore, my opinion is clearly against the Complainant."

The 2d point is, that, *Holliday* having purchased before the time for recording *Rootes's* mortgage was out, a subsequent recording could not as to him be necessary, and therefore will not be required. The reasoning in support of this is ingenious. "Why (it is asked) is a Deed required to be recorded? To give notice, and thereby to prevent innocent persons from throwing away their money. But the purchaser has already done this: how therefore will a notice avail him? And will the Court of Equity require a vain thing? Again, it is said, actual notice is as good as recording; but a deed of mortgage, if recorded in eight months, is good against a purchase made before it was recorded. Suppose, then, actual notice be given within eight months, (as is admitted to be the case here,) will it not be equal-

“ly good against a meane purchaser?” The reply seems to me to be this: our Statute has declared a mortgage, not recorded within eight months, void against a subsequent purchaser: he, therefore, with his deed, takes the legal estate. This is clear from all the cases before quoted. *Sugd.* 471, says, “it will occur to the learned reader that, although a prior purchaser would, in a case of “this nature,” (meaning a case of notice,) be relieved “against the subsequent sale, yet the legal estate will “be vested in the subsequent purchaser, by force of the “Statute.” At Law, then, the subsequent purchaser would succeed, however full and complete the notice; (*vide Sugd.* 498; 4 *East* 221, *Doe v. Luffkin*;) but here Equity interposes upon the ground (as before mentioned) of the fraud committed by the subsequent purchaser, and takes from him his legal advantage. But how will this apply to the present case? In December 1799, *Rootes* takes a mortgage. In January 1800, *Holliday*, without notice of his *lien*. purchases, and takes a Deed which is duly recorded. *Rootes* permits the eight months to elapse without recording his deed. This gives *Holliday* the advantage at law. He has the legal title. A Court of Equity is asked, to take it from him, upon what grounds? His purchase was fair, because without notice. But, it is said, he had notice within the eight months. This, however, (as he swears,) was after he had taken his Deed, and made his payments. It could not, therefore, affect his conscience; could raise no equity against him. Nor was it his fault that *Rootes* permitted the eight months to pass away, without committing his deed to record. It is a maxim of this Court, that, “where Equity is equal, “the law must prevail.” And has not *Holliday* equal equity with *Rootes*? In my mind, he has superior equity; for *Rootes* has been guilty of gross neglect, *crassa negligentia*, as the books call it: although he had early and express notice of *Holliday*’s purchase, he slept upon his post, and permitted the eight months to elapse without recording his deed; and he comes now with a very bad grace to ask this Court to take from a fair purchaser the advantage which his own negligence has given him. He

DECKMAN,
1818.

Rootes
v.
Holliday and
Welch.

NOVEMBER, should remember the maxim, "*vigilantibus et non dormientibus curat lex.*"

Rootes
v.
Holliday and
Welch.

The 3d point is, that, by the delivery of the Deed to Rootes to be acknowledged for record, Holliday's title ceased, and that Rootes's subsequent acknowledgment had no further effect than to revive Welch's title, leaving Holliday without legal right, and the Land still subject to Rootes's claim for the purchase money. Allowing to the surrender of the Deed all the effect claimed for it, I should question very much whether the subsequent acknowledgment would not enure to the benefit of Holliday. This seems so reasonable, that I can not help thinking it must be law; though I have not examined a single authority upon the question; for I can not believe that the surrender of the Deed in this case can have the effect contended for. The authority relied on, is the case of *Eppes v. Randolph*, 2 Call 184, where Judge PENDLETON says, "The term *re-acknowledgment* seems to have produced mistaken ideas in the mind of the Chancellor. He understands it as meaning no more than that Richard and the father, on the 21st of March, acknowledged, that he had, on the 20th of September before, sealed and delivered that Deed: a mistake which information from our Clerk would correct. It would be, that, when a man comes into Court to acknowledge a Deed, the question put to him is not, whether he delivered the Deed at the date?; but whether he then acknowledged the Indenture to be his act and deed." From this, it would certainly seem to be the Judge's opinion, that an acknowledgment before the Clerk is a *re-execution*. For the opinions of that venerable and enlightened man, none can feel a more profound respect than I do. I must still, however, be permitted to doubt whether some error has not crept into the above passage; In the first place, the opinion is extra-judicial; for the point before the Court was not of a Deed acknowledged in Court for the purpose of recording; but of a Deed where the bargain or, *in pais*, calling in witnesses different from those to the original delivery, in their presence again sealed and delivered the Deed, and made them attest this second sealing and delivery, and endorse on the Deed the date

thereof. This course, only, has been taken with a view to an actual re-execution; and this was the case before the Court; but an acknowledgment in Court, I can not but think, is merely to furnish evidence to the Clerk of the *original* sealing and delivery; and I would venture the assertion, that it never has entered into the minds of the parties, (though it is every day's practice,) that, by this transaction, the vendee was divesting himself of his legal estate, and putting it in the vendor's power to convey to him or to any other, or that the vendor was executing (by the acknowledgment,) a Deed to all intents and purposes new, and thereafter to be considered as bearing date from the acknowledgment. But, in the second place, if this point had been directly before the Court, and so decided, it must be considered as over-ruled, by the case of *Moore v. the Auditor*, 3 H. and M. 232. In that case, two of the Deeds in contest, were executed August 4th 1798, and recorded, *on the acknowledgment of the bargainors*, April 17th and 18th, 1799. The question was whether they were void as to the creditors, &c., not being recorded according to law; and it was decided by the Court of Chancery, and the decision affirmed by the Court of Appeals, that they were void, because not recorded within the time prescribed by the Act of Assembly. Here then, is a decision that Deeds, recorded on the same day that they were acknowledged by the bargainors, were not recorded within eight months after their sealing and delivery; which could not have been if the acknowledgment was a re-execution, and the Deed to be considered as bearing date from the acknowledgment. But what would it profit the complainant in this case to prove that the acknowledgment of the Deed to *Welch* was a re-execution; that it must now be considered as a deed of May 14th 1800, and the *mesne* acts of *Welch* null and void? If it defeats the legal estate of *Holliday*, it destroys at the same blow the plaintiff's mortgage; for all the *mesne* acts of *Welch* must share the same fact, must stand or fall together.

DECEMBER,
1818.

Rootes
v.
Holliday and
Welch.

“ But it is said, that, although *Rootes's* mortgage should be considered void, yet as the land is still in *Welch*,

DECEMBER,
1818.

Rootes
v.
Holliday and
Welch.

it ought to be held liable for the purchase money, and, on that ground, the bill sustained. But, surely, this assertion has been hazarded without sufficient reflection. I think there are two insurmountable objections to it: 1st, we know that, in Equity as well as at Law, the *allegatus* and *probatum* must agree; the plaintiff must prove his case. Although he adds a general prayer for relief, that does not authorize the Court to decree for him on a case different from that in his Bill: it only means that all relief, (whether particularly asked or not,) which the Court may think due to the case, shall be given. Now, what is the case made by the plaintiff? It is, simply, and exclusively, a Bill to foreclose a Mortgage: it rests solely on the mortgage. Take this away, and it has no foundation whatever. Can we, then, in the same decree, declare the mortgage void, and yet decree a sale of the land? But, 2dly, it no where appears that the debt, for which the mortgage is given, is the purchase money for the Land which it comprehends. Neither the Bill, nor the mortgage itself, nor any other paper in the cause, that I recollect, states this. It is extremely probable; indeed I feel very little doubt, that this was the fact, from the circumstance of the Deed and Mortgage being on the same day, and both mentioning the sum of twelve hundred pounds as the consideration; but still, there is no positive evidence of the fact; it makes no part of the case;—it is no where put in issue; the defendant is not called on to confess or deny it, and how can we make it the foundation of our decree? I can not conceive.”

“Thus, I am of opinion that none of the points made for the complainant can be sustained. In the close of the notes of the complainant’s Counsel it is said, that whatever may be the decision on the main point, the plaintiff expects a decree for the amount of the bonds, and the Hampshire and Berkeley property. As to the lands in Hampshire and Berkeley mortgaged by Welch to Holliday, I see no objection to decreeing Rootes the benefit of them; but, if, by bonds, is meant the bonds executed by Holliday to Welch, and by him assigned, that would raise the question, whose Equity is best; Rootes’s, or that of

the assignment; a question not made by the original or supplemental bill; and one which we could not properly consider unless the assignees were parties to this suit."

Dawson,
1818.

Rootes
v.

Bill dismissed, as to *Holliday*, with costs; as to *Welch*, without costs.

Holliday and
Welch.

From this Decree; *Rootes* appealed.

Eight for the appellant.

Gilmer and *Wichham* for the appellees.

BY THE COURT, the decree was affirmed; but without prejudice to the appellant's right to proceed against the lands mortgaged by *Welch* to *Holliday*.

~~INDEX~~

Jones against Hubbard's representatives.

Decided,
Dec. 16th,
1818.

A Sale, by trustees, at public auction for ready money, of a tract of land which *James T. Hubbard* had purchased of *Samuel Allen*, and on which he resided, being about to take place for a balance of the purchase money, *Hubbard* requested *Samuel Jones* to become the purchaser at the sale, by bidding the sum due for the land, (which was 2022l. 9s. 4d.) permitting him to re-imburse the money and interest in one year, and take back the land. *Jones* observed that he could not raise the money without considerable sacrifices. *Hubbard* promised to remunerate him; proposed, repeatedly, to borrow the money, and that *Jones* should take a transfer of the Deed of Trust as his security; all which proposals *Jones* rejected. At length it was verbally agreed between them, that *Jones* should attend the sale, and bid up to the amount of the debt to *Allen*; that, if the land should thereupon be struck off to him, he should re-sell it to the said *Hubbard* for a sum thereafter to be agreed on; provided the same should be paid within twelve months. The land was accordingly struck off and conveyed to *J.*, for much less than its cash value. *H.* died before the end of the twelve months, without having agreed on the sum to be paid for re-purchasing the land. Upon a bill in Equity exhibited by his representatives, it was decided, that the contract should be rescinded, on making just compensation; the measure of which was, the sum paid by *J.* for the land, with lawful interest.

1. The land of *H.* being about to be sold for debt, at public auction for ready money, it was agreed, between him and *J.*, that *J.* should bid to the amount of the debt; and that, if the land should thereupon be struck off to him, he should, re-sell it to *H.*, for a sum thereafter to be agreed on; provided the same should be paid within twelve months.

DECEMBER,
1818.

Jones
v.
Hubard's
representa-
tives.

agreed on, should be paid within twelve months from that day. It was alledged by Jones, that it was intended to agree upon such a sum as would not only re-imburse the money so to be given for the land, and indemnify him for his sacrifices in raising it, but also compensate him liberally for his trouble.

In pursuance of this agreement, Jones bid at the sale the sum due to Allen which was much less than the cash value of the land, or the sum which probably would have been bidden for it by other persons; but, the agreement being known by some, if not all who were present, they refrained from bidding;(1) whereupon the land was struck off to Jones at that price in ready money, and was conveyed to him by the trustees. Hubbard died before the end of the twelve months, without having agreed upon the sum to be paid, or making any payment, for re-purchasing the said land; and, the time having expired, his widow and children, (who still resided upon it,) filed their Bill in the Superior Court of Chancery for the Richmond District, to be permitted to redeem the land; for an injunction inhibiting the defendant Jones from turning them out of possession, (as he threatened,) by a Warrant of forcible detainer; and for general relief:—which Injunction was granted, and, on the final hearing, made perpetual; and it was decreed, that, upon the plaintiffs, or either of them, within six months, paying or tendering to the said Jones the sum of 2022*l.* 9*s.* 4*d.* with lawful interest thereon from the 20th day of April 1812, (the day of sale of the land before mentioned,) 'till payment, he should release and convey to them the said tract of land, with warranty against himself and all persons claiming under him; that, in default of such payment, the plaintiffs, and all persons claiming under the said James T. Hubbard, be thenceforth barred and foreclosed of all equity of redemption, &c.; that the land be sold by Commissioners named in the decree, at public auction

(1) Note It appeared in evidence, that, on the day of sale, Hubbard requested Col. William Daniel, one of the trustees, (who said he would have given ten thousand dollars for the land,) not to bid.

for ready money, after advertising, &c., and that, out of the proceeds of such sale, after defraying the expenses thereof, the Commissioners do pay to the said *Samuel Jones* the said 2022l. 9s. 4d. with interest as aforesaid, and the residue, if any, into the Farmers' Bank of Virginia, subject to the future order of the Court, &c.

DECEMBER,
1818.

Jones
v. ⁴
Hubard's
representa-
tives.

From this decree Jones appealed.

Stanard for the appellant.

Gilmer for the appellees.

Judge ROANE delivered the Court's opinion, as follows:—

The contract before us is not a loan, nor is the Deed to be considered as a mortgage. In both those contracts, money has been received on a condition to be returned. In the case of a mortgage, too, it is of no importance that the deed contains no covenant for re-payment. Such a covenant results from the nature of the transaction. In the agreement before us, however, no money has been received by the appellee's intestate, and there was no contract on his part for it's re-payment. It is true, the transaction was intended to have the same effect, in his favour, as a loan. It was intended to enable him to *save* his land; not indeed by preventing a sale, as a loan would have done, but by enabling him to re-purchase it, on the terms to be thereafter agreed upon, and within the time specified. The appellant always refused to *lend* to the appellee's intestate the requisite sum, even under the security of a Deed of Trust; giving for a reason, among others, that it would distress him to sell the land again under such Deed: but he consented to put the business in such a train, as would, in the event of his becoming the purchaser, leave the land absolutely his, if the meditated conditions of re-purchase should not be complied with. If the contract had been *consummated*, as it related to the terms of re-purchase, and they had been unimpeachable in the eye of a Court of Equity, we can see no objection to the contract; and if, in that case, the conditions of re-purchase had not been duly complied with, the estate would have been absolute in the appellant: it would have been discharged from the privilege of re-

Decorum,
1818.

Jones
v.
Hubbard's
representa-
tives.

purchasing. So, if the transaction could be considered in a separate and insulated point of view; if we could consider the appellant as the absolute owner of the land; the failure to agree on the price of a re-purchase would leave the land *his*, as well as a failure to comply with the terms when agreed on. The case of *Smallwood v. Mercer*, 1 Wash. 290, is a direct authority to shew this. In that case, the contract was vacated, because the *price* of the land *could not* be fixed, in the manner agreed on by the parties. But we can not consider the transaction in this insulated point of view. The appellant was not the absolute owner of the land. He was, by the agreement, to become so, on certain conditions only; one of which was, that the terms of re-purchase should be fixed on by the parties. That has not been done in the present instance, nor was the intestate in default in not doing it; and therefore, it affects the contract in all its parts. Without this privilege of re-purchasing, the intestate would never have parted with his land for less than it's value; and, when this privilege is taken from him, the original purchase cannot stand. A purchase is not to be favoured in a Court of Equity, when the consideration therefor has failed.

The contract is therefore to be rescinded, on making just compensation. The measure of that compensation is the principal money with interest. We cannot go into the foreign and speculative enquiry, as to what sacrifices the appellant may have encountered in raising the money. We cannot vary our decree, under like circumstances, with the greater or lesser degree of prudence used by one of the contracting parties.

On these grounds the decree is to be affirmed.

Machir's Executor against Machir's devisees.

Decided,
Dec. 18th.
1818.

A bill was exhibited by *James Machir* executor of *Alexander Machir* deceased against *Henry Machir* and others, children, devisees and legatees of said decedent, and also a certain *Conrad Wakeman*; praying a settlement of the plaintiff's accounts as executor; that the devisees be compelled to convey to the defendant *Wakeman* a tract of land which the plaintiff had sold him with their assent; that *Wakeman* be decreed to pay the purchase money to the plaintiff; and for general relief.

The devisees by their answers declared themselves willing to convey the land to *Wakeman*, when the plaintiff should account for the purchase money, the whole of which, they believed, had been paid him. No answer was filed by *Wakeman*, nor any step taken to compel him to answer; and, in the settlement of the administration account, the Commissioner charged the plaintiff with the whole of the said purchase money; to which he took no exception.

Henry Machir filed a Cross-bill against the said *James Machir*, in which (after complaining of *James's* misconduct as executor, and unreasonable delay in settling his accounts, and insisting that *James* was indebted to him as a legatee of *Alexander Machir*,) he farther set forth, that, in 1798, he was employed by *James* in an agency concerning certain Ohio lands, and was by him promised 300 acres thereof, as compensation for his services:—that the services were rendered, but the compensation withheld:—that *James* had since sold a considerable part of those lands, of the best quality, and was therefore now unable to convey 300 acres, of an average value, according to his promise:—that the parties were engaged in a mercantile partnership, and referred their partnership accounts to arbitrators, who awarded that *Henry* should pay to *James* \$ 2990, 31 Cents:—that *James* brought suit on the arbitration bond, and obtained

1. Upon a Bill filed by an Executor against devisees and legatees, for settlement of his administration account, and for a decree compelling the devisees to convey a tract of land, sold by the plaintiff with their consent; it is error to decree, against the executor, a balance due upon his administration account, without directing such conveyance to be made by the devisees to the purchaser; notwithstanding he, being a defendant, failed to answer the bill; it appearing in evidence that he paid the purchase money, and the devisees, by their answers, having declared their willingness to make the conveyance.

DECEMBER, judgment:—that the question of the 300 acres of land,
1818. and the balance due on the administration account,
Machir's ex- were matters not submitted to the arbitrators; and that
ecutor the monies due the Complainant on these accounts would
v. more than satisfy the said Judgment. He prayed, a
Machir's de- speedy settlement of the executor's accounts, a convey-
visces. ance of 300 acres of land of an average value, &c.; an
injunction to the judgment; and general relief.

The injunction was awarded, on the usual terms.

James Machir's answer denied all the charges against him, of misconduct and unreasonable delay; and, as to the claim for the 300 acres of Ohio land, (without denying the contract,) he denied that it was fully performed on *Henry Machir's* part; which performance, however, was proved by many depositions.

It appearing that, by transfers from the other devisees, *Henry Machir* had become entitled to the whole balance due from *James* upon the administration account, which by the Commissioner's Report, (as amended and confirmed,) was 301*l.* 14.8½, with lawful interest from May 1st 1800; and Chancellor BROWN being of opinion that, *James Machir* having most unreasonably delayed the settlement of his accounts of administration, and having failed to comply with his contract respecting the 300 acres of Ohio land, *Henry Machir* was well justified in resorting to equity; he therefore decreed that *Henry Machir* recover of *James* the said sum of 301*l.* 14.8½ with interest as aforesaid, and the costs of the original and cross suits; that the Injunction be perpetuated as to the amount of such recovery, and dissolved as to the residue; that no damages (1) be allowed on that part of the judgment, as to which the Injunction was dissolved; that *James Machir* convey to *Henry Machir* 300 acres of the Ohio land, of an average value; with liberty to *Henry Machir*, in default of such conveyance, to resort to the Court to compel payment of the present value thereof; for which purpose, the cross suit was continued in Court. But no provision was made for a conveyance

(1) Note. See Act of January 20, 1804, ed. 1808, c. 29. § 4.

to *Conrad Wakeman*, according to the prayer of the original bill, nor for a bond to secure the executor against such debts as might thereafter appear against the estate of the testator.

DECEMBER,
1818.

Machir's ex-
ecutor

vs.
Machir's de-
visees.

From this decree *James Machir* appealed.

Call for the appellant.

Leigh for the appellee.

BY THE COURT. The Decree is erroneous in not requiring a refunding bond according to law, (2) and in not decreeing a conveyance, from the heirs of *Alexander Machir*, of the land sold to *Conrad Wakeman*.

It is therefore reversed with costs, and remanded to be reformed, and the cause to be finally proceeded in, pursuant to the principles of this Decree.

(2) Note. See *Clay v. Williams*, 2 Munf. 105; *Stoval's ex'or. v. Woodson & Wife*, 2 Munf. 303; and *M'Bar's ex'or. v. Brooks & Wife*, *supra*.

Erwin against Vint.

Decided,
Jan. 18, 1819.

SARAH ERWIN widow, executrix and devisee of *Edward Erwin* deceased, in her own right and as next friend to *Hannah Erwin* and *John Erwin* his infant children and devisees, presented a Bill to the Superior Court of Chancery for the Staunton District, on the 9th day of July 1816, to set aside a decree of the said Court pronounced, on the 8th of December 1815, against the said *Edward Erwin*, in his life time, by default, in consequence of his having failed to answer a Bill exhibited by *William Vint* against him, with *William*, *John* and *James Belle* defendants.

1 A final decree by default, may be set aside at a subsequent term, for good cause shewn, in a case where relief cannot be given by bill of review, or bill to impeach the decree for fraud in obtaining it. (1)

2. In this case the circumstances shewn were that the defendant against whom the decree was rendered, was prevented by mistake and accident from filing his answer, and that, in fact, his title was good to the land in controversy.

(1) Note. A Bill to set aside the decree, was filed in this case; but the proper mode of proceeding appears to be by *Petition*. See 1 *Vezey com.*, 205; and *Ambler*, 89.

SARGENT,
1819.

Erwin
v.
Vint.

The decree in question, as to the said *Edward Erwin*, required him to execute to the plaintiff *Vint* a conveyance of a tract of land, with special warranty; and permitted the said plaintiff to take peaceable possession thereof: directing that he be forever quieted in the said possession.

As to the *Bells*, it was decreed, that, on the said plaintiff's paying or tendering to the defendant *William Bell* a certain sum of money, the said *William Bell* should execute to him a deed of bargain and sale for the same tract of land, with special warranty, and covenant to refund the money with interest, in case the plaintiff should at any time be evicted by a title paramount.

The grounds alleged for setting aside the decree, were, that the defendant *Erwin* had been prevented at one time by a mistake as to the day of session of the Court, (which had frequently been changed by the Legislature,) and disabled by an accidental hurt to his knee at another time, from attending and filing his answer; and that the Complainant his executrix and devisee was now prepared to shew that, in fact, his title was good to the land, and paramount to any claim on the part of the other defendants *William, John and James Bells*, or of the plaintiff *Vint*, neither of whom had any title, in law or equity, to recover the said land, against him.

The Bill prayed that *Vint* should be held to answer; but, without waiting for his answer, notice was given that a motion would be made to set aside the decree, and the statement in the Bill for that purpose was supported by exhibits and affidavits: but Chancellor Bower overruled the motion with Costs; whereupon the Complainant *Sarah Erwin* appealed to this Court.

Stunard for the appellant. As a general proposition, it is admitted that, after the term at which a final decree has been rendered, the Court rendering such decree has no power to set it aside or change it, except by bill of review, or on the ground of fraud. But to this proposition there is an exception, where the decree has been by default, and without investigation of the merits.—Cases of this kind are not within the scope of bill of

review, nor of bills to set aside decrees obtained by fraud; and therefore it is unnecessary, as it would be fruitless, to resort to either of these remedies. Yet, in such cases, it is within the sound discretion of the Court, for good cause shown, to open the decree or the enrollment of it, and let in an enquiry into the merits.(a)

This exception to the general rule, is supported not only by authority, but the soundest reason. The decree being by *default*, the cause of the default can never be a subject of enquiry until the decree has been pronounced, and generally not until after the term has past. But the party may have been prevented from asserting his rights in proper time, by insuperable obstacles, without any fault on his part, and may be prepared to shew a clear title to the subject in controversy.

A Bill of Review will not redress the mischief; because that only lies for error apparent *on the face* of the decree, or for evidence discovered after the decree. A Bill to set aside the decree for fraud will not lie; because the plaintiff obtained it not by fraud, but by the misfortune of the defendant. It follows therefore that, unless the Court can give relief upon an application in some other form, a most unjust decree may be rendered, (as in this case,) against a party whose default is perfectly excusable, and yet there can be no redress!

Leigh contra, challenged the Counsel for the appellant to produce any other case in which the exception contended for was recognized. He suggested that, in the cases cited, the suit may have been still pending as to some of the parties, though finally decided and enrolled as to others. He also referred to *Musiel v. Morgan*, 3 Bro. Ch. cases, 74, as tending to establish a different doctrine.

Stanard in reply. The case in 1 *Vezey senr.* 205, was decided with much consideration, upon a search for precedents; and the cases there cited are directly in point. In *Robson v. Cranrod*, 1 Dick. 61, the first precedent, the applicant for opening the enrollment was the only plaintiff, and the decree was one dismissing his bill; and, while it does not appear that there was more than one de-

JANUARY
1819.

Erwin
v.
Vint.

(a) *Kemp*
v. *Squire*, 1
Vezey senr.
205; *Cunyngham*
v. *Cun-*
ingham,
Ambl. 89.

JANUARY,
1819.



Brewin
v.
Vint.

pendant, yet, if there were many, the dismissal of the bill terminated the suit as to all. In *Benson v. Vernon*, 3 Bro. Parl. cases, 626, and also in the principal case of *Kemp v. Squire*, there was but one plaintiff and one defendant. I am sure that Mr. Leigh would not have *deliberately* hazarded the surmise he has made, even if the cases were not so explicit. For deliberation would have satisfied him, that a decree is never *enrolled* until the suit is terminated as to *all* the parties.

The case from 3 Bro. Ch. cases, does not conflict with that from *Vexey*. It only shews that a decree obtained by *fraud* cannot be set aside, on motion, or by *petition*. And why? Because, fraud or no fraud being the matter in dispute, both parties are entitled to be heard *regularly* on that question; and the decree stands or falls as it may be decided. The Court with good reason say, we will not anticipate the decision of that question by a *summary* enquiry, but a bill shall be filed, that it may be *regularly put in issue*. Between that case and this, there is a broad line of distinction. The power I contend for, is exercised only over decrees by default. The grounds on which it is exercised, are the matters of *excuse* for the default, which are *collateral* to the questions that may be brought in issue, and on which the decree must be founded; and these are always proved in a *summary* manner, often by *affidavits* of the parties, and in no wise operate on, or influence the decision of the questions involved in the litigation. A formal Bill is therefore unnecessary in cases like the present. But where the question is, whether the decree was obtained by *fraud*, the decision upon the merits of the case may obviously be affected in a great measure by the decision of that question.

Judge ROANE pronounced the following opinion of the Court.

Under the circumstances of this case, and on the authority of the case of *Kemp v. Squire*, 1 *Vexey* Sear. 205, the Court is of opinion that the Decree ought to have been set aside, and the appellants permitted to file their answers, on payment of costs, in order to a trial of the

cause upon its merits. The decree appealed from is therefore reversed, with Costs, and the cause remanded, to be proceeded in according to the principles of this Decree.

JANUARY,
1819.

Erwin
v.
Vine

Preston against Bowen.

Decided
February 3d,
1819.

A special action on the case was brought, in the Superior Court of Washington County, by *Henry Bowen* against *Robert Preston*.

The declaration contained two counts. The 1st. stated, that the plaintiff, on the twenty second day of December 1809 applied to the defendant, Surveyor of the County of Washington, at his office in the said County, "for copies of six surveys, which had been made in the name of and by a certain *John Donnell*, and *James, Robert and John Barr*, (which said surveys are

1. It is part of the official duty of the surveyor of a County, to furnish, in reasonable time, when demanded, copies of all surveys, not specially excepted in the Land Law. (Sec

R. Code of 1819, c. 86, s. 35 & 69.

2. A special action on the case lies against the Surveyor of a County for *fraudulently refusing* to furnish copies of surveys, when lawfully demanded, and thereby enabling a third person to locate the lands, therein described, before the plaintiff.

3. Where the declaration charges that the defendant, *contrary to his official duty*, refused to furnish copies of certain surveys, when demanded by the plaintiff; if the defendant be excused, by any provision in the land-law, from furnishing the copies so demanded, he ought to plead it *specially*.

4. Evidence offered to the Jury, and properly applying to the issue joined, ought not to be rejected on the ground of objections to the declaration.

5. Upon a motion for a new trial, on the ground that the damages found by the Jury are excessive, if the plaintiff release such part thereof as, in the Court's opinion, ought to be released; and thereupon, judgment be entered for the residue; such judgment, not appearing unreasonable, should be sustained by the appellate Court.

6. In an action against the Surveyor of a County, for refusing to furnish copies of certain surveys of lands which the plaintiff wished to enter as waste and unappropriated; the court on the plaintiff's motion, instructed the Jury, "that the surveys in question having been made in May 1774, the Land was liable to be entered as vacant in December 1809, unless they were returned to the Land office; but that the plaintiff was not bound to shew that they were not returned to the Land office in due time;" and this instruction was not considered erroneous by the Court of Appeals.

PRESTON,
1819.

Preston
v.
Bowen.

“ described to have been made, the one half for the said
 “ *John Donnell*, the other half for the said *James, Robert*
 “ and *John Barr*, as tenants in common and not as joint-
 “ tenants,) and were of record in the Surveyor’s books
 “ of the said defendant in his said office; the plaintiff be-
 “ ing then and there ready to pay the fees allowed by
 “ law to the defendant, for making the said copies,
 “ whose duty it was to furnish them to the plaintiff; he
 “ the said plaintiff wanting them for the purpose of
 “ enabling him to enter and locate the lands circumscrib-
 “ ed and included by the said surveys, *which then had*
 “ *become waste and unappropriated*, and to the locating of
 “ which the said copies were essential and important:”
 that the defendant, contrary to his official duty, delayed
 and refused to make out and deliver those copies to the
 plaintiff, and thereby delayed and prevented the plaintiff
 from making his entries and locations, until other per-
 sons, with whom the said defendant had combined and
 confederated for the purpose of defrauding him, had en-
 tered and located the said lands. The 2nd Count stated,
 that “ whereas the plaintiff applied to the defendant
 “ surveyor of Washington County, at his office in said
 “ County, and furnished him *memoranda* for copies
 “ of certain surveys, which were of record in the said
 “ office, and were made in the name of *John Donnell*, and
 “ *James, Robert* and *John Barr* and were commonly
 “ known by the name of *Donnell’s* surveys, and was
 “ then and there ready to pay the fees allowed by law
 “ for making the copies of said surveys, amounting to six
 “ in number, containing one thousand and fifty four
 “ acres; copies of which said surveys were necessary to
 “ enable the plaintiff to enter and locate the said several
 “ tracts of land, *which had then become waste and unap-*
 “ *propriated and subject to the location of the plaintiff:*”
 and the defendant fraudulently delayed and refused to
 make out and deliver those copies to the plaintiff within
 a reasonable time after the application, and, fraudulently
 and contrary to official duty, combined with one *John*
Preston junr. and delayed to deliver those copies to the
 plaintiff, in order to enable the said *John Preston junr.*

DEFENDANT,
1819.

—
Preston
v.
Howe.

to enter and locate the same lands before the plaintiff; and thereby the plaintiff was prevented from entering the lands, and John Preston junr. was enabled to enter them before him, and did enter and locate them before the plaintiff; and thus the plaintiff was prevented from obtaining the lands; by reason whereof, he was injured, &c.

At the trial, upon the plea of *not guilty*, the plaintiff offered in evidence genuine copies of four Entries made by John Preston junr., December 23d 1809, (which are set forth *in hæc verba*,) with the view of shewing, by that and other evidence, that the defendant and John Preston junr. his confederate had deprived the plaintiff of the opportunity of locating the same lands comprized in the surveys, mentioned in his declaration, copies of which he also offered in evidence, (*in hæc verba*;) whereupon, the defendant objected to the admission of the evidence, on the ground that the description of John Preston junr.'s surveys and entries, in the declaration, was so *general* and *vague* that no such evidence ought to be received.

The Court overruled the objection and admitted the evidence.

Copies of two other Entries by John Preston junr. and two other surveys, (both set forth *in hæc verba*;) were offered by the plaintiff, for the same purpose for which the others were offered as aforesaid. The defendant, for the same reason, objected, but the Court admitted them also.

The defendant objected, that, the statement in the declaration, "that the lands circumscribed and included within the boundaries of the surveys," therein referred to, "had become waste and unappropriated," (without stating how,) being too *vague* and *general*, the Court should not permit any evidence to be given relative to such statement. In this objection, he was again overruled.

He moved the Court to instruct the Jury, that the surveys mentioned in the declaration, as those of which the plaintiff demanded copies, were *legal, valid and subsisting appropriations of the lands* therein comprized, at the time when John Preston junr. made his entries, and when the plaintiff was prevented from locating the same land,

FEBRUARY,
1819.

Preston
v.
Bower.

as stated in the declaration, unless the plaintiff proved that the surveys had become void. The Court refused to give such instruction, and, on the plaintiff's motion, instructed the Jury, "that, the surveys in question having been made in May 1774, the land was liable to be entered as vacant land in December 1809, unless they were returned to the Land office; but that the plaintiff was not bound to shew that they were not returned to the Land office in due time."

To these several opinions of the Court, the defendant filed as many bills of exceptions.

The Jury found for the plaintiff, and assessed his damages to one thousand dollars.

After the verdict was rendered, all the evidence, that had been given on the trial, was stated at large, and made part of the record; and a motion was made for a new trial; 1st, because the Jury had rendered a verdict without sufficient evidence; 2dly, because the damages were excessive. The Court thought the damages excessive, but, on the plaintiff's releasing \$492 part thereof, overruled the motion; whereupon the defendant again excepted.

The defendant moved, also, in arrest of judgment; 1st, because the declaration stated no cause of action; no law having imposed it as a duty on the Surveyor to furnish copies of Surveys generally:—2dly, because it did not state a case from which the Court could decide that it was not embraced by the 29th section of the Act concerning the Land Office, passed December 17th, 1793; and 3dly, because the declaration was too general, and wanted precision.

The Court overruled this motion also, and entered judgment for the plaintiff for \$508, damages, and costs from which the defendant appealed.

Stanard for the appellant, waived the objections taken at the trial, but insisted on the reasons assigned for a new trial, and in arrest of judgment. He also remarked, that the appellant was not apprised by the plaintiff of the purpose for which the copies were wanted, in order that he might know the importance of a prompt and immediate compliance with the request.

Delight for the appellee. By the errors in arrest of judgment it is objected to the declaration, that it states no cause of action, because no law has imposed on the Surveyor the duty of furnishing copies of surveys, generally. I own, I can find no such law. Neither can I find any law imposing it as a duty on the Register of the Land Office to furnish copies of Patents. The Land law says, only, that the Patent shall be recorded by the Register, and that a copy attested by him shall be as good evidence as the original. (a) So, too, I have searched in vain for a law requiring the Clerks of any of the Courts of Justice to furnish copies of Deeds, Wills or Records, generally. Will this Court then adopt a principle, which, exempting a Surveyor from the duty of furnishing copies of documents recorded in his office, will go the length of exempting the Register from the duty of furnishing Copies of Patents, and the clerks of the Courts of Justice from furnishing copies of records and instruments recorded in their respective offices? But the offices of the Register and the Clerks are public offices, for recording, and thereby preserving, certain muniments of titles and rights; and certain fees are allowed them by law, for furnishing copies required of them:—it results then, from the very nature and end of the institution, that they are bound to furnish copies. In like manner, the Surveyor's office is a public office instituted by law for recording and preserving certain muniments of the inception of titles; fees are appointed by law for copies furnished by him; and therefore it follows, from the nature and end of the institution, that every Surveyor is bound to furnish copies of documents recorded in his office. (b) It is provided in the Land Law, (c) that the Surveyor shall not, within twelve months after a survey made, issue or deliver any certificate, copy or plat of land, except to the persons for whom the survey was made, or their order, unless in cases of Caveats. But for this provision, the Surveyor would have been bound, at any time, to deliver Copies of surveys to any body demanding the same:—the provision plainly supposes that such had been his duty. Except in the case so provided for, any per-

FEBRUARY,
1819.

PRESTON
V.
BOWEN.

(a) Ed'n.
of 1794, 1803
and 1814. c.
86, § 43, 44.

(b) Ed'n.
of 1794, 1803
and 1814, c.
86., § 25, 27,
28, 55; *Ibid*,
c. 115. § 1.

(c) *Ibid* §
29.

Ex parte,
1819.

Preston
v.
Bowen.

54.

son is entitled to demand a copy of any survey. It is farther provided, (d) that it shall not be lawful for the surveyor to withhold from any person entitled to demand the same, a plat by him demanded; saving that he shall not be bound to deliver a plat to any non-resident, (d) *Ibid.* § 'till his fees are paid or secured. This provision furnishes foundation enough to sustain the present action, even if it were founded on the Surveyor's refusal to furnish the Copy, simply. But that is not the only foundation of the action. The declaration charges that the Surveyor confederated with another to deprive the plaintiff of his location, and to vest the fruits of his diligence in such confederate: a proceeding surely contrary to his official duty.

It is also objected to the declaration, that it does not state a case from which the Court can decide that it was not embraced by the 29th section of the land law, before cited. But, if the Surveyor was bound to furnish copies generally, and he could have defended himself on the ground that *these* copies were not demandable by the plaintiff, as being within the exception provided by that section, *he* ought to have *pleaded* that matter specially. The declaration alleges, substantially, that the copies demanded were not within that exception; for it says that it was *his official duty* to furnish them, which could not be, if the provisions of that section applied to the case. However, all objections of this kind to the declaration, are cured by the verdict. It cures omissions of averments of any matter, without proving which the Jury ought not to have given such verdict; and this *they* should not have done, if it was not proved that the copy of the survey was demanded more than twelve months after it was made.

As to Mr. *Stanard's* objection, that the appellant was not apprised by the plaintiff of the purpose for which he wanted the copies, the answer (which has been anticipated, and is I think conclusive,) is, that the declaration alleges that the defendant not only *failed*, but *fraudulently refused* to furnish the copies. The action was not brought for mere neglect of duty, but for a wilful and vicious denial of right.

The defendant's exception to the Court's refusal of a new trial, can not be supported. The first ground of the motion, that the evidence was not sufficient to warrant the verdict, is surely untenable. The Jury, (not the Court,) is to judge of the sufficiency of testimony, unless it be withdrawn from their cognizance by a demurrer to the evidence.(1) Upon the second objection to the verdict, the defendant, in fact, succeeded. The Court refused the new trial, only because the plaintiff released nearly half the damages assessed by the Jury. It does not appear that the defendant himself, after that release, made any complaint as to the quantum of damages.

PRESTON,
1819.

Preston
v.
Bowen.

BY THE COURT, the Judgment was affirmed.

(1) Note. See *Keel and Roberts v. Herbert*, 1 Wash. 203; *Martin and Jones v. Stover*, 2 Call, 514—519; *Austin v. Richardson*, 3 Call, 201—206; *Fisher's executor v. Duncan and Turnbull*, 1 H. and M. 563; and *Hollingsworth v. Dunbar*, 5 Munf. 199.

Cropper against Carlton and Wife.

Decided,
Feb. 3d,
1819.

AN Ejectment brought in October 1810, by John Carlton and Peggy his Wife, and Tabitha Allen, against John Cropper, in the Superior Court of Accomack County, the Jury found a Special Verdict, stating that John Allen the elder was seised in fee of a tract of land situate in Accomack County, containing by estimation three hundred acres, and, being so seised, upon the day of 1784; duly made and published his last Will and testament, in these words, &c.; containing, among other clauses, the following; "I give and bequeath unto my three sons, Stephen, Edmund and John Allen, three hundred acres of land, to be equally divided between them and their heirs; and, if either of them should die without

1. A Special verdict in Ejectment set aside, for not finding the time of the death of a person, under whom the lessors of the plaintiff might or might not have been entitled to the land in controversy; their title depending upon the time when he died, which,

from the circumstances disclosed in the verdict, probably could have been found by the Jury; also, for not finding whether the defendant, or those under whom he claimed, had or had not such possession of the land as would be sufficient for his defence, in that action, whatever might be the state of the title.

Plaintiff,
1819.

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Cropper  
v.  
Carlton and  
Wife.

"heirs, then his part of land, so dying, my wife to sell  
"go to the other two of my aforesaid sons, and to them  
"and their heirs:" that the said *John Allen* left three sons  
his only children; to wit, *Stephen*, *John* and *Edmund  
Allen*; that *Stephen*, one of his said sons and devisees;  
departed this life in the year 1771, intestate and without  
issue; that *Edmund Allen* another of said sons left this  
Commonwealth in December 1780, as 2d Lieutenant on  
board of an American Privateer; that, at the capture of  
St. Eustatia, on 3d February 1781, the said *Edmund  
Allen* was taken a prisoner by the British and carried to  
the City of London; that he was the elder brother of  
the said *John Allen*, they being twins, and was living in  
the fall of 1781; that *John Allen*, the other brother de-  
parted this life upon the 7th of March 1788, intestate,  
leaving issue *Peggy* and *Tabby Allen*, his only children  
and co-heirs; that, in 1808, the said *Peggy Allen* intermar-  
ried with *John Carlton* one of the lessors of the plaintiff:  
that the said *John Allen*, by Indenture, dated June 7th,  
1785, conveyed to *Jabez Pitt*, with special warranty,  
against himself and his heirs, the said tract of land con-  
taining 300 acres: that *Jabez Pitt* and wife, by Inden-  
ture bearing date August 21st, 1786, conveyed to *Little-  
ton Armitrader* 100 acres, part of the said tract: that the  
said *Jabez* and wife by Indenture dated September 29th,  
1786, re-conveyed to the said *John Allen* 145 acres, being  
a moiety of the tract supposed to contain 300 acres; and,  
by Indenture dated October 1787, conveyed to *John Cro-  
pper*, the now defendant, 45 acres; being the balance of  
the said tract; that, on the 8th of August 1788, *Littleton  
Armitrader*, by Indenture, conveyed to the said *John  
Cropper* 20 acres, being a part of the aforesaid tract;  
and, on the 23d of December 1800, by another Indenture,  
conveyed to the said *John Cropper* 60 acres, and, by the  
same Deed, confirmed to him 25 acres, which the said  
*Armitrader* had, previously, to wit, on the 24th of July  
1794, conveyed to him by a Deed not recorded; being  
the balance of the 100 acres aforesaid: that, on the 26th  
day of September 1787, the said *John Allen* and wife, by  
Indenture, conveyed to the said *John Cropper*, with spe-

and warranty against himself and his heirs, 145 acres, being a moiety of the aforesaid tract, supposed to contain 300 acres; by virtue of which several conveyances, (all which were duly recorded, and were found *in hæc verba*.) the said John Cropper is now seized of the whole of the said tract of land supposed as aforesaid to contain 300 acres, but appearing from the Deeds to contain only 290 acres; that the witness who stated that he saw Edmund Allen in London, first communicated in the Summer of 1809, that information, and the evidence he had given to the Jury; but the facts to which he deposed, were accidentally discovered in the course of conversation on another subject; and that there was no intimation, made to the witness at that time, of any claim to the land in controversy, or of any intention to commence this suit. They found the lease, entry and ouster, &c., and concluded in the usual form.

Freeman,  
1819.

Cropper  
v.  
Carlton and  
Wife.

The Court gave judgment for the plaintiff, that he recover his term yet to come, of one messuage, one garden and one plantation with the appurtenances, containing 145 acres, more or less, in the declaration mentioned, &c. From which Judgment the defendant appealed.

Wickham for the appellant.

Upshur for the appellees.

Judge ROANE pronounced the Court's opinion, as follows:—

The Court is of opinion, that the special verdict in this case is defective, in this, that it does not find the date of the death of Edmd. Allen, (1) therein mentioned, which, from the circumstances therein disclosed, might

(1) Note. It seems, that, if Edmund Allen died without issue, before the 7th of June 1785, (when John Allen made his first conveyance mentioned in the Verdict,) or, indeed in the life time of the said John, the title of the latter was good under the will of John Allen the elder, to the whole tract of 300, or 290 acres, and therefore the defendant's title, regularly derived from him, with warranty against his heirs, was also good:—but, if Edmund Allen died after the death of the said John Allen his brother, and without issue, the lessors of the plaintiff were entitled to one half of the land, as heirs, not of their father, but of Edmund Allen. The time of Edmund Allen's death was therefore important.

FEBRUARY,  
1819.

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Cropper
v.
Carlton and
Wife.

probably have been done; and also in this, that it does not find whether a possession existed, in the appellant, or those under whom he claims, of the premises in question; which *possession*, whatever may be the state of the title, might, in event, have been sufficient for the appellant in this action.

The Judgment is therefore reversed, with Costs, and the cause remanded, in order that a new trial may be had therein.

Decided,
Feb. 10th,
1819.

Stewart against Crabbin's guardian.

1. An action for an assault and battery committed upon an infant, ought not to be brought in the name of the guardian of such infant, but in the name of such infant by his or her guardian or next friend; and error in this respect before Jan. 1st, 1820, was fatal, even after general verdict for the plaintiff. ☞ But see R. Code of 1819, c. 128. § 103, Vol. 1st. p. 511-12.

AN action of assault and battery was brought in the Superior Court of New Kent County by *Alexander H. Crabbin guardian of William H. Crabbin an infant*, against *Thomas E. Stewart*. On the plea of *not guilty*, a general Verdict was found for \$200 damages, and Judgment entered, from which the defendant appealed to this Court.

Stanard for the appellant.

Wickham for the appellee.

BY THE COURT. It appearing from the Declaration, that this action is brought by and for the Guardian, instead of being brought by the infant by his guardian, the Court is of opinion, that the judgment should be reversed, and entered for the appellant.

before Jan. 1st, 1820,

was fatal, even after general verdict for the plaintiff. ☞ But see R. Code of 1819, c. 128. § 103, Vol. 1st. p. 511-12.

Liggon against Fuqua and wife.

Decided,
Feb. 14th,
1819.

THOMAS LIGGON died, under twenty one years of age, without issue, having title to certain real estate derived by descent immediately from John Liggon his father.— The appellee *Mary*, wife of *Giles Fuqua*, was his paternal grandmother; the appellant *Liggon*, his paternal uncle; and these were his only relations in the paternal line, living at the time of his death. *Fuqua* and wife filed their Bill in the Superior Court of Chancery for the Richmond District, for partition of the said real estate; Mrs. *Fuqua*, as grandmother of the deceased, claiming to be co-heir and parcener with his Uncle.

Chancellor TAYLOR was of opinion, that, under the provision in the 9th section of the Act directing the course of descents, (Edn. of 1794, 1803 & '14, c. 93,) the lands in question should be divided into two moieties, one whereof should pass to the wife of the plaintiff and her heirs, and the other to the defendant and his heirs. He therefore decreed partition according to the prayer of the Bill:—from which decree the defendant appealed.

The following was this Court's opinion, pronounced by Judge ROANE.

As the land in the case before us was derived to the infant from his father, and as it is admitted that he died leaving one or more brothers or sisters of the half blood on the part of the mother, the Court is of opinion that the case comes strictly within the 5th section of the act of descents, Rev. Code of 1794, p. 168. This case then is withdrawn from the general operation of the Act, not only for the purpose of excluding the half brothers and sisters, but also for that of shewing who is to take. In this case, the brother of the father (the appellant,) is to take in exclusion of the paternal Grandmother (the appellee) who is wholly omitted to be mentioned in the section. It was entirely as competent to the Legislature to cut her out in this case, by omitting to mention her, as to exclude the half blood. In the case of *Templeman v. Steptoe*, all the judges are to be considered as deciding

1. Under the 5th section of the Act of Descents of 1792, where an infant died without issue, having title to certain real estate derived by descent immediately from the father, leaving no relations in the paternal line, but a grandmother and uncle, the grandmother was not entitled to inherit any part of such estate, but the paternal uncle was entitled to the whole.—
But See R. Code of 1819, c. 96, § 11, 12, vol. 1st, p. 356.

FEBRUARY,
1819.

~~~~~  
Liggon  
v.  
Duqua and  
Wife.

against the *Grandmother*; the majority, by sustaining the claim of the *Uncle*, on the ground that *he* was named in the section, which *she* is not; and the dissenting Judge, by deciding against the *stronger* pretensions of the *Uncle*; because he supposed the implication was too weak to bear out even *his* claim. He therefore more than decided against the *Grandmother*, by negating the pretensions of the *Uncle*.

On the ground therefore of this unanimous opinion of the Court against the grand mother, as well as of our own construction of the Act, we are of opinion to reverse the decree and dismiss the Bill.

Decided  
February 13, 1819. **Cosby's executors against Bell's administratrix.**

1. Upon a *scire facias* to revive a judgment, in debt, for a penal sum, to be discharged by principal and interest, if the defendant confess judgment according to the *scire facias*, the plaintiff is not entitled to a writ of enquiry of damages, to recover more than the penal sum; (the principal and interest accruing by lapse of time, amounting to more,) but must take execution upon the original judgment, with the addition, only, of the costs upon the *scire facias*. (1) ¶ See *Tidd's Pr.* 798; and 3 *Burr.* 1791.

A *scire facias* was issued from the Clerk's office of Powhatan County Court, on the 26th day of February 1813, in favour of *Bell's* administratrix against *Cosby's* executors, to revive a Judgment, rendered July 17<sup>th</sup> 1783, against *Cosby* in his life time, for the sum of 165*l.* debt, and 182 lbs. tobacco and \$2,50 cents costs; to be discharged by the payment of 82*l.* 10*s.* 0*d.*, with interest at the rate of five per centum per annum from the 22<sup>nd</sup> of March 1783, until paid, and the costs aforesaid.

The defendants pleaded, "payment by the testatory" and "no such record," on which the plaintiff joined issue. When the cause was called for trial, the defendants, by permission of the Court, waived the said pleas, and offered to confess judgment according to the *scire facias*; whereupon the plaintiff moved the Court to award her a

(1) Note. But in debt on a judgment, damages are recoverable, ¶ See *Tidd's P r.* 798.

Writ of enquiry of *damages*, (2) and a trial by Jury in the cause; but the Court overruled the said motion, and refused to grant such writ and trial; to which opinion the plaintiff excepted.

FEBRUARY,  
1819.

Cosby's exe-  
cutors

v.  
Bell's admin-  
istratrix.

Judgment was then entered, by confession, that the plaintiff should have execution, &c. according to the *scire facias*. Upon an appeal, the Superior Court of law reversed it, and ordered the cause to be sent back, with instructions to the County Court to allow the appellant a writ of enquiry of damages, and a trial by Jury.

From this Judgment of reversal, the defendants appealed to the Court of appeals, (where, the cause being submitted without argument,) it was determined that the Judgment of the Superior Court be reversed, and that of the County Court affirmed.

(3) Note. More than twenty years having elapsed since the judgment, and therefore the principal and interest amounting to more than the penal sum; the plaintiff wished to get the additional sum by way of damages.

### Chamberlaine and others against Marsh's administrator.

Decided,  
Feb 13th,  
1819.

CURTIS KENDALL, being entitled to 4666 2-3 acres of military land, as an officer in the late Virginia line, executed a conveyance to Samuel Marsh, dated on the 18th of March, 1797, conveying to him all his right, title and interest in 4666 2-3 acres, located and surveyed to him the said Kendall, under his military land warrant, No. 4226, and situated over the River Ohio, on Paint Creek, in five different entries; four for 1000 acres each, and one for 666 2-3 acres; covenanting that he had not sold or conveyed to any other person, and authorising him to demand all plats and certificates of survey, &c. The consideration expressed in the deed was \$1500.

1. A contract for sale of land, rescinded in equity, on the ground that both parties were mistaken, as to the situation, and other circumstances materially affecting the value of the land.

On the 18th of April following, Samuel Marsh, in consideration of \$1000, to be paid in thirty days, and of

December,  
1818.

Chamber-  
laine and  
others

v.

Marsh's ad-  
ministrator.

two sums of \$1750 each, payable in January, 1798 and '99, agreed to convey and assign to Lyne Shackelford all his (Marsh's) right and title to the military lands granted Kendall, under the deed of conveyance from Kendall to Marsh, of the 18th of March, and all the right of Kendall to the land; Marsh agreeing to procure from Kendall a Power of Attorney authorising Col. Richard C. Anderson, of Kentucky, to assign and transfer to Shackelford the plats and certificates of survey of the land, and to execute a deed to convey the land to Shackelford; the deed to be delivered when the first payment was made and security given for the balance.

On the 18th of May, Kendall executed the power of attorney to Anderson to transfer to Shackelford the plats and certificates of survey of the land, and on the 22d of May, 1797, Marsh executed a deed, bargaining, selling, &c. *"all the right, title and interest, which he the said Samuel has unto the Military Bounty Land granted to Curtis Kendall, for his service as an officer in the Virginia line of the State Continental Army, containing 4666 2-3 acres, located and surveyed to him the said Curtis, under his military land warrant, No. 2926, and situated over the river Ohio, on Paint Creek, in five different entries; four for one thousand acres each, and one for 666 2-3 acres, which said lands were granted and conveyed unto the said Samuel Marsh, by deed from said Kendall, bearing date the 18th day of March last, with all the right, title and interest, which he, the said Samuel Marsh, has under the deed aforesaid;"* with all the title of Kendall, with authority to receive all papers, plats, and surveys, &c. from the surveyor, &c.

The first payment being made, and a deed of trust given to secure the balance, Kendall's power of attorney and Marsh's deed were delivered to Shackelford.

William Chamberlaine was jointly interested with Shackelford in the purchase, and Thomas Newton and William Wilson with Marsh, although their names did not appear in the original contract or deed. (1)

(1) Note. All the parties concerned resided in Virginia, at a great distance from the lands in question.

FEBRUARY,  
1819.

Chamber-  
laine and  
others

v  
Marsh's ad-  
ministrators.

On enquiry it was found that no part of Kendall's military lands were entered on Paint creek; one tract of 1200 acres was entered on the waters of Paint Creek, 1200 acres on Deer Creek, 1200 acres on Indian Creek, and 1066 2-3 on Brush Creek; and none of these tracts had been surveyed.

Chamberlaine and Shackelford then filed their Bill and an amended bill against Marsh and his associates, stating these matters, and alledging that they were led to make the purchase by the representation that the lands lay on Paint Creek, where the soil was extremely fertile, and believing that there had been actual surveys; that the warrant was located on lands very inferior in soil and situation to the lands on Paint Creek, and that even of these lands a great part would be lost by other titles;—praying that the contract might be set aside, and the money paid by them refunded.

Marsh answered, denying all fraud, and insisting that he only sold Kendall's right to military land *wherever it might be*, and that he did not engage that it should be on Paint Creek or in any other particular place. He alledged that he shewed Shackelford a memorandum from Anderson, the surveyor, stating that Kendall's military claim was located on the waters of Paint Creek, to the best of his recollection, in five entries, four for 1000 acres each, and one for 666 2-3 acres; (which memorandum was made an exhibit and annexed to this answer;) that he did not know Paint Creek from any other creek, and that Shackelford was well acquainted with the military lands on the north-west side of the Ohio.

Newton and Wilson answered, insisting that the contract was fair, was binding, and ought to be carried into effect.

In the amendment to the bill the plaintiffs charged, that Marsh, after they had discovered that the lands were not located on Paint Creek, and were of inferior value, and that they had not been surveyed, went to the western country, and had the warrants withdrawn and located on lands still of very inferior value:

Copies of the first and second sets of entries were exhibited in the cause.

FEBRUARY,  
1819.

Chamber-  
laine and  
others  
v.  
Marsh's ad-  
ministrator.

Three witnesses were examined. *Ramus Davis* deposed that he himself bought Kendall's military lands for the taxes from the year 1801 to 1807; that lands on Paint Creek were much more valuable than lands situated as Kendall's were; that they were worth from two to fifteen dollars the acre; that the seat of government of Ohio was on Paint Creek; that the witness was present at a conversation between Chamberlaine and Marsh, in which Marsh said that one of the original entries was on the waters of Paint Creek; Chamberlaine replied, that he had offered to take that or any other land on Paint Creek, but that Marsh had refused to let him have that entry, unless he would take all Kendall's entries; and that Marsh, in presence of the witness, admitted this to be true.

*Richard Anderson* deposed that the original entries were made by one Obannon, whom he understood to be the agent of Kendall, and were withdrawn and located elsewhere by Obannon after the purchase of the plaintiffs.

*David Allen* deposed as to the practice of withdrawing military warrants in Ohio, and locating them elsewhere in the military district, and stated the value of military land warrants to have been somewhere about one dollar an acre.

The cause came on to be heard between the plaintiffs and the defendant *Marsh*; not being ready as to the other defendants, and no steps having been taken to bring them before the Court; whereupon, Chancellor TAYLOR, being of opinion that the matters of equity relied upon were not supported by testimony, dismissed the Bills as to *Marsh*, with costs; from which decree the plaintiffs appealed.

*Wickham* for the appellants.

*Call* for the appellee.

Judge BROOKE pronounced the Court's opinion, as follows:—

The Court is of opinion that the articles of agreement between *Shackelford* and *Marsh*, by referring to the Deed from *Kendall* to *Marsh*, made the description of the lands in that deed a part of the said agreement: that,

considering that description as if it were inserted in the said articles, the Court is of opinion that *Marsh* intended to convey, and *Shackelford* to purchase, 4666 acres and 2-3ds of an acre of military land, located and surveyed to the said *Kendall* under his military land warrant, No. 2926, and situated over the Ohio on *Paint Creek*, according to the terms of the said Deed. That this was the contract between the parties, the Court is of opinion is also to be inferred from the circumstance, that the lands stipulated to be conveyed by the articles of agreement, are described, in the subsequent deed from *Marsh* to *Shackelford*, by a repetition of the expressions in the Deed from *Kendall* to *Marsh*. The Court is farther of opinion, that it does not appear, by the documents and evidence, that any fraud was intended by *Marsh*: on the contrary it appears, that he was under the impression that the lands intended to be conveyed were correctly described in the said deeds.

On these grounds, the Court is of opinion to reverse the decree of the Chancellor; and the cause is to be sent back, the contract to be set aside, the money paid to be refunded, and the deed of trust cancelled, and to be farther proceeded in against the defendants, if necessary, according to the principles of this decree.

FEBRUARY,  
1819.

Chambers-  
laine and  
others  
v.

Marsh's ad-  
ministrators.

### Armstrong and Wife against Hickman.

Decided,  
Feb. 17th,  
1819.

UPON a bill of Injunction filed by *Adam Hickman* against *Armstrong* and Wife executrix of *Peter Devietman* deceased, and her securities, in the Superior Court of Chancery for the Clarksburg District, Chancellor *CARR*, on the 16th of October 1816, delivered the following state of the case, opinion and decree.

matter, not known to the Complainant before the first was dissolved; it appearing that the contract in question, though not tainted with fraud, was founded upon a mistake in relation to the existence of an important fact, of which both parties were ignorant.

1. After dissolution of one Injunction, another was granted to the same Judgment, and made perpetual, upon new

FEBRUARY,  
1819.

Armstrong  
and Wife  
v.  
Hickman.

The Bill states, that, on the 10th of September 1803, the plaintiff and *P. Devietman* entered into a contract, by which *Devietman* sold to the plaintiff \$22,000 of *Morris* and *Nicholson's* Notes at 5s. in the pound; the notes to be delivered in one month; and the plaintiff to pay, at the delivery of the notes, the whole amount, in good property, at cash price, viz. horses, cows, hogs, or improved land, at the valuation of two good men if the parties could not agree: that, about the 10th of October, *Devietman* died: that the defendant *Hannah*, being left Executrix, qualified, giving bond in one thousand dollars, and the defendants *Morris* and *Davison* her securities; that the Executrix sued the plaintiff at law, on the Covenant; that the plaintiff, for a long time, believed that the Covenant would be set aside, either upon the ground of fraud, or because the parties themselves had subsequently annulled it by a parol agreement; that he was informed by Counsel that this could not be done at law, and therefore suffered a verdict and judgment against him; pleading, merely for form, conditions performed; that the judgment was for \$5500, with interest from the 4th of October 1803: that, in order to set this aside on the grounds before stated, he filed a Bill in the Staunton Chancery Court, which was on the 24th of July 1811 dismissed; that Court having directed issues at law, and being satisfied, by the verdicts on them, that the contract ought not to be rescinded.

The Bill farther states, that, seeing this can not be done, the plaintiff hopes to have the benefit of the covenants in his favour: that it is contended by the defendants, that *Devietman's* covenants are complied with, because he had tendered to the plaintiff, and his executrix brought into the Court of law, upon the trial, promissory notes to the amount of \$22,000, signed by *Nicholson* and endorsed by *Morris*. The Bill acknowledges the production of the notes, and describes them; but denies that this was a compliance; because, although they *purported to be*, they were not in fact such notes as the contract contemplated; but that the facts proving this defect were unknown to the plaintiff at the time of the trial.

at law, and therefore could not then be used by him: that, by the Covenant, the said *Deveitman* was bound to deliver to the plaintiff \$22,000 of *Morris* and *Nicholson's* Notes, by which was meant Notes obliging *Morris* and *Nicholson* to pay the said sum; Notes in which they should both be liable for the money: that the Notes tendered were drawn payable to *Morris*, signed by *Nicholson*, and indorsed by *Morris* in blank, whereby, under the laws of Pennsylvania, *Morris* the payee and endorser became as much, and as immediately, liable to the holder, as *Nicholson*: but that *Morris*, being a merchant resident in Philadelphia, did, after the 1st of June 1800, and long before the 10th of February 1803, commit an act of bankruptcy, whereupon a Commission under the Act of Congress issued against him,—Commissioners were appointed, he was declared a bankrupt, Assignees were appointed, to whom the proper assignment was made, and the said *Morris*, having, within the time limited, surrendered himself, and in all things conformed to the directions of the law, became a certificated bankrupt; whereby he was discharged from all debts owing at the time he committed the act of bankruptcy, or which might have been proved under the Commission; of which number were the Notes tendered by the said *Deveitman* in performance of his contract: all which transactions with respect to the bankruptcy were completed and fully ended before the 10th of September 1803, the date of the contract; so that, at the time of said contract, the notes were not negotiable or transferable as the notes of *Morris*, or in any way binding upon him: of which bankruptcy the plaintiff had no knowledge, either at the time of the contract, or at the time of prosecuting the suit at law, or at any time prior to the fall of the year 1812.

The Bill farther states, that the defendant *Hannah*, together with the defendant *William Armstrong*, with whom she intermarried, did, in 1807, remove to the State of Maryland, where they have ever since resided; that they say they have fully administered the assets of the testator; and the plaintiff is fearful, if obliged to sue them at law, that they would in the mean time enforce

FEBRUARY,  
1819.

Armstrong  
and Wife  
v.  
Mickman



FEBRUARY,  
1819.

ARMSTRONG  
and Wife

v.

HICKMAN.

their Judgment against him, and then meet him with the plea of fully administered. The records of the proceedings in the action of Covenant and the Bill in Equity are made part of the Bill.

To this Bill the defendants *Morris* and *Davison*, the securities of the Executrix, have demurred. The defendants *William* and *Hannah* have pleaded the Judgment at law, and the Decree in Equity:—they also rely on the Statute of Limitations. By way of Answer, they deny that the Contract of September 10th 1803, was made at the solicitation of the said *Peter*, but in the manner set forth in their answers to the former Bill of the plaintiff, to which they refer as part of this answer:—that, with respect to the bankruptcy of *Morris*, they knew nothing at the time of the contract, nor do they now know any thing, but what they have learnt from the Bill:—that, at the trial of the issues directed by the Court of Chancery, they believe it was in proof that, in 1803, *Morris* and *Nicholson* were considered insolvent, and their paper worth little or nothing; but they admit that, at that trial, there was no proof that *Morris* had been declared a bankrupt and discharged under the laws of the United States; and they insist that, unless it can be shewn, (which is not alledged) that *Devietman* knew of the bankruptcy, and concealed it from the plaintiff, it furnishes no ground of relief, or of evidence as to fraud in the Contract. They aver that the said *Peter* became possessed of the notes fairly; and they submit, that the question, whether a recovery on those notes was so barred, as that they did not come within the description contained in the agreement? has been already decided in the action of Covenant brought by the defendant *Hannah* against the plaintiff. They then give an account of the assets of the said *Peter*, and aver that they have paid out to his creditors more money than they have received, or expect ever to receive, from his estate.

After presenting this view of the case, I will consider the points growing out of it.

1st. Does the judgment in the action of Covenant, preclude us from enquiring into the bankruptcy of *Mor-*

FEBRUARY,  
1819.

Armstrong  
and Wife  
v.  
Hickman.

ris? It is contended that it does; on this ground, that, by the articles of agreement, the delivery of *Morris and Nicholson's* Notes was a condition precedent to the payment for them; that, therefore, in the action of covenant brought to enforce such payment, it was necessary to aver, and at the trial to prove, a delivery, or tender at least, of such notes; that the recovery in that action is conclusive evidence that this tender was made, of such notes as the Covenant required; which evidence can not be contradicted or impeached, while the verdict and judgment stand. It is certainly true, that a Verdict and Judgment, unreversed, shall be final between the parties; ~~that~~ the same point shall not be a second time litigated. But it must be the *same point*; the *same case*. If, in a trial at law, a party has been unable to bring his cause fairly and fully before that tribunal; if he was then ignorant of important facts, which afterwards came to his knowledge; it can not be supposed, that this imperfect trial should prevent him from bringing his new case before a Court of Equity. Our books are full of such cases. *Ambler v. Wyld*, 2 Wash. 36, *Ross v. Pines*, 3 Call 568, *Cochran v. Street*, 1 Wash. 79, *Lee v. Foushee*, cited 1 Call 553, *Pickett v. Morris*, 2 Wash. 255, and *Branch v. Burnley*, 1 Call 147, are all of this kind. In the last case, Judge ROANE, who was opposed to the opinion of the other Judges, and against relief, yet lays down the general doctrine thus:—"I hold it to be a  
" clearly established principle, that a Judgment of a  
" Court of common law, though erroneous, given on a  
" legal question, shall never be disturbed in equity, upon  
" grounds which were proper for the consideration of the  
" common law Courts, and which, therefore, we must  
" suppose such Court to have decided upon; unless the  
" applicant to the Court of Equity can shew some particular circumstances to have taken place, operating  
" as an impediment to his availing himself of those  
" grounds, upon the trial at law."

Again, in the same case, he says, "Far be it from me  
" to impeach the power of a Court of Equity to give  
" relief against a Judgment at law. My position how-

FEBRUARY,  
1819.

Armstrong  
and Wife

v.

Hickman.

“ ever is, that, when such relief is granted, it is on the  
“ ground of some unconscientious conduct, on the part  
“ of the party enforcing that Judgment; or on the ground  
“ of some vice in the judgment itself, arising from cir-  
“ cumstances, *other than an erroneous opinion, in point of*  
“ *law, of the Common law Court, in that particular*  
“ *case.*” Here we find this distinguished Judge, while  
opposing the jurisdiction of Equity in the particular  
case, admitting that it may properly interfere where the  
applicant shews that there was some impediment to his  
availing himself, before the law Court, of the grounds  
stated in his Bill; or where the vice in the Judgment  
“ arises from circumstances other than an erroneous  
“ opinion in point of law.” The new feature in his  
case, by which the plaintiff would support the jurisdic-  
tion of this Court, is the bankruptcy of *Morris*, existing  
at the time of the contract, and affecting, as he contends,  
the negotiability of the notes, but of which he could not  
avail himself on the trial at law, because he was then,  
and for a long time afterwards, ignorant of the fact.  
The weight of this circumstance in the question of final  
relief, I shall discuss presently:—it is sufficient to say  
now, that I think it gives the case so far a new aspect,  
as to remove the verdict and judgment out of the way,  
and authorise this Court to take jurisdiction.

The remarks on this point apply with equal force to  
the Bill in Chancery. That Bill sought relief on two  
grounds:—1st, fraud in the original contract, by mis-  
representing the value of the notes, and by making the  
plaintiff drunk, and dealing with him in that situation:—  
2dly, that the first contract was annulled by a second  
parol one. To ascertain the truth of these charges, the  
Chancellor directed issues at law, which were found  
against the plaintiff, and his Bill dismissed. It is ad-  
mitted by the defendants that, at the trial of these issues,  
no evidence of the bankruptcy was given. That, indeed,  
formed no part of the Bill. Suppose A. were to enter  
into a Covenant with B., by which he engaged to deliv-  
er him, in one month, a sound healthy negro, and B. en-  
gaged to pay, on the delivery, \$600:—A., at the proper  
time, tenders the slave:—B. refuses to receive him:—A.

brings Covenant, and recovers the \$600:—B. files a Bill for relief, stating that he was made drunk by A., and, in that condition, entered into the contract; also, that the negro, instead of being sound, was affected by a disease which rendered him of no value. Upon trial, these facts are found against B., and his Bill is dismissed. By this time, he has discovered what he did not know before, that the slave, instead of belonging to A. was, at the time of the contract, and still continued, *the property of D.* Can it be supposed that the door of Equity would be closed against this new ground of relief, because the party had before sought to destroy the contract on ground which he could not support? Surely not.

FEBRUARY,  
1819.

Armstrong  
and Wife  
v.  
Hickman.

The next point is the Statute of Limitations, on which the defendants rely. It will be recollected, that the Statute does not take in proceedings in Equity: it enumerates certain actions at law, and prescribes a time within which they shall be commenced; but it says nothing of bills in equity. Courts of Chancery have, however, adopted the provisions of the Statute, and apply them *by analogy*. For example, the Statute says, that "actions of account, and upon the case, (other than accounts between merchants,) and actions of debt upon any contract without specialty," shall be brought within five years and not after. If there should be a claim, which, at law, must have been prosecuted by one of these actions, but which particular circumstances rendered it proper to bring into Equity, that Court, if the Statute was relied on, would look to the nature of the claim, and apply the Statute, unless there were some feature in the case, which would render such application contrary to good conscience. What would be the effect of the Statute upon the case before us, according to this rule? The Bill is founded on an agreement evidenced by a *sealed instrument*. If the plaintiff had sued on it at law, what would have been his action? *Covenant*.—And our Statute has prescribed no period, within which an action of covenant must be brought. Courts of law, indeed, have laid it down as a general rule, that the lapse of twenty years,

FEWSTAY,  
1819.

  
Armstrong  
and Wife  
v.  
Hickman.

without any step taken by the obligee, or acknowledgment by the obligor, shall raise a presumption of payment: and there is no doubt that Courts of Equity, after the lapse, even, of a much shorter time, would refuse their aid, unless the party could shew such reasons for the delay, as would acquit him of the charge of negligence. But this is not under the Statute: it flows from a rule, adopted by those Courts long anterior to the existence of that law, under which they have always refused their aid to *stale* demands, where a party has slept upon his right, and acquiesced for a length of time. See 3 *Bro. ch. cases*, 639.—In the case before us, there were only about ten years, from the date of the contract to the commencement of this suit: during almost the whole of this time, the claim was in litigation between the parties; for the judgment obtained by the defendants in the Court of law in 1807, was immediately enjoined; and that injunction only dismissed in 1811. In 1813, this suit was brought; and the plaintiff states in his bill, and has proved, as well as a negative of that kind can be proved, that he did not become acquainted with the bankruptcy of *Morris* (the foundation of the present Bill,) 'till the fall of 1812. Nor do I know that his ignorance of this fact 'till so late a period, can be imputed as *laches* to him; for it took place in another State, at the distance of 4 or 500 miles, in the great commercial City of Philadelphia, where it might not excite much attention, as there were, probably, hundreds of similar cases, under the Bankrupt law. From this view, it seems to me, that the Court ought not to apply the Statute of Limitations to the case.

Having disposed of these points, we come to the merits. And here I will observe, that I rather think the Bill is unskillfully drawn in one particular; that is, the mode in which it seeks relief; by a *performance of the contract* on the part of the defendants. I am disposed to think it would have been better to have sought relief *from the contract*. As, however, the effect would be the same, whether the Court enjoin the Judgment at law, or decree in favour of the plaintiff an equal sum, and set it off

against the judgment; I do not suppose that *this* (if an error) would be considered so material, as to defeat the plaintiff's claim to relief, if, upon the merits, he should seem entitled to it.

FEBRUARY,  
1819.

ARMSTRONG  
and Wife  
v.  
HICKMAN.

On the 10th of September 1803, *Devietman* contracted to deliver to the plaintiff, in one month, \$22,000, of *Morris* and *Nicholson's* notes, for which, on delivery, the plaintiff engaged to pay, in property, five shillings in the pound. On the 28th of July, 1801, a Commission of bankruptcy issued against *Robert Morris*: on the 31st of that month, he was declared a bankrupt; and on the 4th of December 1801, he obtained his certificate; by which, he was, under the law, absolutely discharged from the payment of all debts which might have been proved under the commission; which may be said to include that whole class of paper known by the name of "*Morris* and *Nicholson's* notes;" for it is not pretended, on any hand, that notes of this kind issued after the bankruptcy. By the Act of Congress, there are to be three meetings for the examination of the Bankrupt, within forty-two days after notice given by the Commissioners; at which time, the creditors are notified to come forward, prepared to prove their debts. By the same Act, there are to be two dividends; the first within twelve, the last within eighteen months after issuing the commission; at either of which dividends, those creditors who have not before done so, may appear and prove their debts: but, after this, there can (as I understand the law,) be no proof of debts: nor can there be, after eighteen months, a dividend made, if there has been none declared within that period, as was the case here. On the 4th of September 1803, therefore, when the contract for the delivery of *Morris* and *Nicholson's* notes was made, there were none of those notes from which *Morris* was not absolutely discharged; nor could any holder of those notes, at that date, prove them under the commission against *Morris*. But it appears that the parties to the contract were, at the time of making it, (both buyer and seller) entirely ignorant of the bankruptcy of *Morris*; and, of consequence, both considered the notes legally binding on

FEBRUARY,  
1819.

Armstrong  
and Wife  
v.  
Hickman.

him, whatever they might have thought of his ability to discharge them. It is therefore contended by the Counsel for the plaintiff, that, both parties being under the mistake arising from their ignorance of the bankruptcy, this Court ought to relieve against the contract. On the other hand, it is insisted for the defendants, that, fraud being negatived by the verdict on the issues, the contracts must be taken as fair and *bona fide*, and therefore this Court ought not to interfere. But can not a Court of Equity interfere upon the ground of *mistake*, where there is no fraud suggested? On this subject, I have examined the books, and will cite some authorities:

In 2 *Pow. on Contr.* 196, it is said, "an agreement may be set aside by reason of mistake in the parties making it; if the point misconceived be the cause of the agreement: for, if an agreement be entered into upon the presumption, by one of the parties, of a fact, that is really not so as that party believed, the agreement, as to him, is of no force; because he did not give his assent to what is agreed upon, absolutely, but upon such and such conditions which were not verified by the event." In *Newland on Contracts*, 432, it is said, "Equity, in rescinding contracts, does not confine its relief to cases of fraud. Cases, likewise, of plain mistake or misapprehension, though not the effect of fraud or contrivance, are entitled to the interference of that Court." In *Pothier on Obligations*, p. 14, it is said, "Error is the greatest defect in Agreements; for agreements are formed by the assent of the parties, and there can be no assent where the parties have erred as to the object of their agreement. *Non videntur qui errant consentire*. Error annuls the agreement, not only when it falls on the thing itself, but also when it falls on the *quality* of it, which the parties have chiefly in view, and which constitutes the substance of the thing." In 1 *Call* 316—17, *Jolliffe v. Hite*, Judge LYONS says, "the general rule, as laid down by Civilians, is, that, if there be not a full knowledge of all the circumstances, it is ground for avoiding the contract. 1 *Vern.* 32; 2 *Vern.* 243. And the reason is,

“ because the buyer proceeds upon the supposition of a  
 “ quality, which if the thing does not contain, the con-  
 “ tract should not oblige the party who contracts under  
 “ a misapprehension:—for, in this case, the party is not  
 “ conceived to have agreed absolutely, but upon the sup-  
 “ posal of the presence of a thing or quality, on which,  
 “ as on a necessary condition, his consent was founded;  
 “ and, therefore, the thing or quality not appearing, the  
 “ consent is understood to be null and ineffectual; which  
 “ is equally true whether the seller knew of the defects,  
 “ or not; for he ought not to reap the advantage of an  
 “ apparent value, which the thing sold seemed to have,  
 “ and had not.”

Bankruptcy  
 1819.

Armstrong  
 and Wife  
 v.  
 Nicholson

From these authorities, it is clear that a Court of Equity may interfere on the ground of mistake, notwithstanding the absence of fraud; but the mistake must be a *plain* one, and one which affects, in an important degree, the subject matter of the contract. It is evident, (as I have before stated,) that the parties were ignorant, at the time of the contract, of the Bankruptcy of *Morris*; that they supposed, the one that he was selling, the other that he was buying, notes which imposed on *Morris* a legal obligation to pay. It is equally clear, that, at the time of the contract, there was no legal obligation on *Morris* to pay those Notes; that he was as much released from them as if he had actually paid them; nay, in a better situation: for, under the law, he might, if sued, appear *without bail*, plead the general issue, and give the bankruptcy in evidence. There was, then, a *plain* mistake:—but was it an *important* one? The notes purported to bind *Morris and Nicholson*; but *Morris* was released from them. Here was one chance of recovery lost; one prop to their credit fallen; and that, too, I believe we may say, the principal prop:—for *Morris* was known to every one, as a man of great talents, particularly for speculation; as having, at one time, possessed immense property, and resources almost unlimited; and it was still hoped by those unacquainted with the extent of his embarrassments, that he might, by some lucky effort, retrieve his fortunes. This hope, his Bankruptcy totally



FEBRUARY,  
1819.

Armstrong  
and Wife  
v.  
Hickmah.

destroyed. It must have gone farther, and not only destroyed the hope of payment from *Morris*, but most materially have injured the credit of *Nicholson*, who was so intimately connected with him; for one of these Giants in speculation never falls alone; all connected with him feel the shock:—and those within his immediate vortex are generally drawn down along with him. Suppose, at the moment of the contract, it had been told to *Hickmah* that *Morris* had been declared a Bankrupt two years before. Can any one believe that he would have gone on with the contract? that he would have bound himself to pay \$5500 for the Notes of a Man, who was released from them by his bankruptcy; and whose bankruptcy could hardly fail to involve his partner in one common ruin? It is not credible. I therefore consider this a mistake affecting in an important degree the subject matter of the contract.

But it is said, that this was a *speculating* contract, with which this Court ought not to interfere. I can not see how a practicable line of discrimination can be drawn between this sort of commerce, and that which we see every day carried on in Bonds, Bills and Notes. A man wanting to raise money, takes these evidences of debt, as he would any other species of property, to the market, and sells them for what they will bring; sometimes more, sometimes less:—and these sales, if there be no feature of fraud, are recognized by Courts of Equity as fair. Again, it is objected, that these Notes were known to be a depreciated paper, floating in the market; constantly passing from hand to hand; and that, from these circumstances, we must conclude, that the seller merely sold the *paper*, without any idea of recourse; and the buyer took upon himself every possible risk. I must again compare this case to the sales of Bonds, Bills, &c.; remarking, that I can discover no more difference between them, with respect to the last objection, than the former. When a man sells bonds, it is either with, or without assignment:—if he assigns, (except it be without recourse,) he guarantees the solvency of the obligor:—if he passes them without assignment,

the transferee takes upon himself the risk of insolvency: this, at least, is, I believe the general idea; though, upon the reasons given by Judge ROANE in *Mackey v. Davis*, I think it may be well maintained, that, even without assignment, the transferee, having used due diligence, may come upon the transferrer, in case of the insolvency of the obligor. But, however this may be, I have always supposed it a question clear of doubt, that, without any assignment, the buyer of a bond, or note, might come upon the seller, if it should turn out that the bond was not the bond of the obligor, or that he had paid it, or was in any way discharged from the payment of it, when the transfer took place. Now we have before seen that, at the time of transfer in our case, *Morris* was absolutely discharged from the payment of these Notes.

FEBRUARY,  
1819.

Armstrong  
and Wife  
v.  
Hickman.

Let us, for a moment, view this case in another light. Perhaps it is only a different illustration of the same facts and principles. By the contract, *Devietman* covenanted to deliver to *Hickman*, notes of *Morris* and *Nicholson*; that is, (as every one would say at a glance,) notes legally binding *Morris* and *Nicholson* to pay their amount. Now, has he ever complied with this Covenant? Certainly not:—for the Notes which he tendered were not binding on *Morris*:—he had been discharged from them. Could *Devietman* or his representatives, without a compliance on his part, call upon *Hickman* for payment? No:—for *Hickman* was to pay upon the delivery of the Notes. And, if the fact of *Morris's* bankruptcy had been proved to the Court of law, I can have no doubt that it would have defeated the recovery of the defendants. But it was *Hickman's* misfortune to be at that time ignorant of the fact. As it appears, from this view of the case, that *Devietman* has not complied with his covenant, it occurred to me that it might be doubtful whether this case was not like *Pollard v. Patterson*, 3 H. and M. 80, and whether the plaintiff here ought not to be left to prosecute at law, on the Covenant. But I think there are some important distinctions between the cases. If *Hickman* were to bring Covenant, at law, he might be met by the verdict and judgment, on the same

**February  
1819.**

**Armstrong  
and Wife**

**Hickman.**

agreement, in favour of the defendants. Now for this might operate as a bar, I shall not, sitting here, undertake to decide. But it is a hazard to which I see no reason for subjecting the plaintiff. Again, he charges, that since the judgment at law against him, the defendants have removed out of the State, and are still non-residents, so that he can not sue them; but that, if he could, they would, during the progress of such suit, force from him the amount of their judgment, pay it away in discharge of other debts, and meet him with the plea of "fully administered." Another charge in the Bill is, that the defendants have wasted the assets, and, to conceal that fact, have failed to return an inventory; and they are called on for a discovery on this head. Their Answer acknowledges that they have not hitherto returned an inventory which they file with the Answer. Upon all or some of these grounds, I have no doubt that it was proper for a Court of Equity to take jurisdiction of this cause: and, having done so, for what should they now send the party to law? Is it to establish the breach of Covenant? But this court has all the evidence before it; there is no contradiction, or clashing, in it; and it may certainly be decided here, whether there has been a performance or not. Is it to ascertain the damages, which the plaintiff has sustained by the breach? But he claims none. He only seeks to be released from those which the defendants have recovered of him. It is, in principle, like *this* case. A. sues B. at law, and has a judgment:—B. enjoins:—his injunction is dissolved on the coming in of the answer, but he continues it as an original. A.'s Execution being let loose, he makes the money: but, on the final hearing in Equity, B. proves to the satisfaction of the Court, that, in equity and good conscience, there ought to have been no recovery against him at law. Will not the Court decree that the money paid under this iniquitous judgment, shall be refunded? So, in this case, if the plaintiff had paid to the defendants the amount of the judgment at law, I would decree to him the same amount against them. But, as it appears that he has not yet paid the Judgment, the same

relief will be given, the same end answered, by injoining the defendants perpetually from proceeding on their judgment at law; which is decreed and ordered accordingly, with costs of suit to the plaintiff. The bill is dismissed against the securities; but without costs; for it was not improper to make them parties, as, in the event of proceedings on that part of the Bill which charges waste, they would have been interested.

Plaintiff,  
1819.

Armstrong  
and Wife  
↓  
Hickman.

Thus have I, in as narrow a compass as I could, given my views of this difficult, embarrassing and complicated case. Though my opinion is the result of much and anxious reflection, I am by no means confident of its correctness; and should be well pleased to see it tested by an appeal.

From this decree, *Armstrong and Wife* appealed.

The cause was argued, on the 15th, 16th, and 17th days of December 1818, by *Stonard* for the appellants, and *Wickham* for the appellee.

February 17th 1819, Judge ROANE pronounced the Court's opinion, that the Decree be AFFIRMED.

~~Continued~~

## James against M'Williams and Wife.

Decided,  
Feb. 19th,  
1819.

IN an action of Detinue, in the Superior Court of Mathews County, brought by *George M'Williams*, and *Mincy* his wife against *Thomas James* for a slave, the Jury found a verdict for the plaintiffs, subject to the decision, that, should either of them die "without lawful issue," her part should go to the other." (1) This was a good limitation over, in the event of the death of either, without lawful issue living at the time of her death.

2. In a case agreed, the parties, after setting forth a clause in a Will, by which a limitation over, in favour of the plaintiff, was to take effect, upon the death, without lawful issue, of a legatee of a particular estate, proceeded to state that the said legatee, being more than twenty-one years old, died without leaving any children living at the time of her death; having had only one, who was dead at that time. This was adjudged a defective case, and a venire de novo was awarded, because there might nevertheless, have been issue of the said legatee, living at the time of her death; and, also, because the whole Will was not stated.

(1) Note. See *Timberlake v. Graves, ante*, and the cases there referred to. *Archam v. Grisham & Ante* 187; *Croft's adm v. Croft* 187; *456*; *Dialoke v. Morphey* 192.

FEBRUARY  
1819.

James  
v.  
M<sup>c</sup>Williams  
and Wife.

opinion of the Court upon a case agreed between the parties, in the following words:—"The parties agree that the negro in the declaration mentioned is in the possession of the defendant, being part of the estate devised to *Mary Lyell*, and subject to this clause in her father's Will:—"It's my Will, should my daughter *Mary Lyell* die without lawful issue, that her part to go to *Nancy Figg Lyell*; and, should *Nancy Figg Lyell* die without lawful issue, for her part to go to *Mary Lyell*; and, should both die before they come to the age of twenty one, that then two third parts go to my son *Richard Davis Lyell's* children."—"that *Mary*, being more than twenty-one years old, died without leaving any children living at the time of her death; having had only one, who was dead at the time of her death. And the parties submit to the decision of the Court, this question; are the plaintiffs, the said *Nancy* and her husband, entitled to the negro devised to *Mary*, and subject to the above clause of her father's Will; or is the defendant, purchaser of *Mary*, entitled to have the said negro?"

Upon this case agreed, the Court gave judgment for the plaintiffs; whereupon the defendant appealed.

The cause being submitted without argument, Judge ROANE pronounced the opinion of this Court, as follows:

On the merits, as they now appear, the Court has no doubt but that the limitation over to the female appellee is good, in the event of *Mary Lyell* dying without lawful issue, according to several decisions in this Court:—but this fact is not agreed in the case. It is only agreed that she died "without leaving any children living at the time of her death," which admits the possible existence of issue of the said *Mary Lyell*. For this defect in the case, and also because the whole Will of old *Lyell* is not stated, but only one clause thereof, the judgment must be reversed, and a new trial awarded,

## See against Greenlee.

Decided,  
Feb. 19th,  
1819.

**THIS** was an action of Ejectment, brought in October 1814, for 400 acres of land in Mason County; the declaration containing three Counts; the first, setting forth a demise from *Alexander Welch*; the second, a demise from *John Welch, Nancy Welch* and *Frances Welch*; and the third, a demise from *Michael See*.

At the trial, the plaintiff offered in evidence a patent from the Commonwealth to *Alexander Welch*, for 400 acres, admitted to be the land in controversy; dated the 2d of December 1795. He then proved by evidence, that *Alexander Welch*, the patentee, departed this life in 1809, leaving *John Welch, Frances Welch* and *Nancy Welch* his only children and heirs at law. The plaintiff then offered in evidence a deed of bargain and sale from them to *Michael See*, for the same land, dated September 20th. 1813, and duly recorded. Here the plaintiff rested his title. The defendant then introduced sundry witnesses, who proved that he *Edward Greenlee* was in the use and occupation of the said land from about the year 1803—4, and had ever since continued to live thereon and use and occupy the same as his own, claiming to hold the said land under a title adverse to that of *Alexander Welch*, the father of the said *John, Frances* and *Nancy Welch*, and adverse to that of them and *Michael See*. The Court thereupon instructed the Jury, that, if they should be satisfied that, at the time the heirs of *Alexander Welch* executed the deed of bargain and sale to *Michael See*, the defendant was in actual possession of the said land,

and sale of the same to a third person, such bargainee can not recover in Ejectment; but the bargainors may.—[See *Hopkins and Watson v. Ward and others*, ante.

3. Three demises were laid in a declaration in Ejectment; one, from the Patentee of the land, who was dead; another, from his heirs; and a third, from a person to whom they had executed a deed of bargain and sale. The plaintiff recovered on the second demise; though he could not on the first or third.—[See the same case, last cited.

4. It seems, that a plaintiff in Ejectment can not recover on a demise from a person who is dead at the time of the action brought.

1. The heirs of a Patentee of Land may recover in Ejectment, against a person who had the use and occupation of the land as his own, in the life time of the Patentee, and so continued until after his death; claiming to hold the same by adverse title; the duration of such possession having been less than twenty years. [See *Clay v. White*, 1 Munf. 162; and *Clay v. Ransome*, Ibid. 454.

2. In such case, if the heirs, being out of possession of the land, have executed a deed of bargain

January,  
1819.

See  
v.  
Greenlee.

claiming it under a title adverse to their's, then and in that case, they could not, while thus out of possession, convey, by deed of bargain and sale, such title as would enable the plaintiff to maintain Ejectment under the demise from *Michael See*.

The plaintiff then insisted that, under the demise, in the declaration, from the heirs of *Alexander Welch*, he had a right to recover, although not upon the demise from *Michael See*:—but the Court instructed the Jury that, upon this demise, the plaintiff could not recover; “1st, because, from the plaintiff’s own shewing, the heirs “of *Alexander Welch*, by the said deed of bargain and “sale, had parted with all their right, to the said *Michael See*; which deed appeared to be in full force “and effect between them and *Michael See*, although not “sufficient to enable him to maintain an Ejectment:— “2d, that, by this deed, the defendant was enabled to “shew a title out of them the said heirs, which was sufficient for him as the plaintiffs must make out a good “title in themselves.” The Court also, for the like reason, instructed the Jury that the plaintiff could not recover upon the demise made by *Alexander Welch*; and for another,—namely, that he appeared to be dead before the bringing of this suit. To which opinion and instructions of the Court, the plaintiff excepted; setting forth the Patent and Deed of bargain and sale in *hanc verba*. Verdict and judgment for the defendant; whereupon *Michael See*, one of the lessors of the plaintiff, appealed.

*Wickham* for the appellant.

*Stanard* for the appellee.

Judge ROANE delivered the Court’s opinion.

On the authority of the case of *Hopkins v. Ward*, in this Court, the Court is of opinion that the lessee of the appellant had a right to recover under the second demise laid in the declaration. The Judgment is therefore reversed, and the cause remanded for a new trial to be had, in which the instruction given in relation to that demise, is not to be repeated.

## Ferguson against Franklins.

Decided,  
Feb. 20th,  
1819.

IT appeared by a special verdict in this case, (which was an action of Ejectment in the Superior Court of Campbell County, brought by *John Ferguson* against *Edmund and Thomas Franklins*,) that the defendants, being seized and possessed of the land in controversy, conveyed it by two deeds of trust, (found in *hæc verba*) to a certain *Andrew White*, to secure the payment of a debt to *Higginbotham, Brown & Co.*; the Deeds empowering the said trustee to sell the land at public auction for ready money, "having previously advertised the time and place of said sale at least four weeks:" that the trustee, after duly advertising, sold the said land to satisfy the debt, at public auction, "not at the house of *Edmund Franklin*, nor on the premises agreeably to the advertisement, (which was set out at large,) but within eighty yards of the said house within full view of it, at the edge of the enclosure of *Edmund Franklin*, and without his land line about fifteen or twenty steps; and it was believed by some present that they were on the premises:" that, at the said sale, the lessor of the plaintiff became the purchaser at the price of \$1000, which he paid the trustee, who paid it over to *Higginbotham, Brown & Co.*, and conveyed the land to the said purchaser by deed of bargain and sale, found in *hæc verba*:—but that the trustee *Andrew White* was an alien, when the deeds were made to him, and when he conveyed the land.

Upon this verdict, the Superior Court gave judgment for the defendants; whereupon the lessor of the plaintiff obtained a Writ of *Supersedeas* from this Court, alledging error in said judgment; 1st, "because, altho' it is true that the trustee was an alien, yet he had no escheatable interest in the subject, and was merely the organ, mutually chosen by the parties, to secure the payment of the debts for which the deeds of trust were given:—2d, "because the title of the trustee, such as it was, could only have been divested under the laws of this State,

1. A sale and conveyance of land by a trustee, can not be set aside on the ground that he was an Alien when the deed was made to him, and when he conveyed the land to the purchaser.

2. If a tract of land, being advertised to be sold on the premises, be sold, not immediately on the premises, but within eighty yards of the dwelling house, within full view of it, & about fifteen or twenty yards from the boundary line; it being believed by some present that they were on the premises; such sale, being regular in other respects, and no fraud appearing, is not to be set aside.



FEBRUARY,  
1819.

*Ferguson*  
v.  
*Franklin.*

“by process of escheat, even if it were escheatable; and  
“no such process had ever been instituted.”—3d, “be-  
“cause, altho’ it is true that the sale was not immediate-  
“ly on the premises, yet it was sold within eighty yards  
“of the dwelling house, within full view of the same and  
“of the premises, and with every advantage of examina-  
“tion, which the deeds and the advertisement under  
“them contemplated; so that a *substantial* compliance  
“with the deeds and advertisement took place, so as to  
“meet the views of the parties, and answer the purposes  
“of justice.”

*Wickham and Stanard* for the plaintiff in error.

*Wm. Hay, jr.* for the defendants.

February 20th 1819, Judge ROANE pronounced the Court’s Opinion that the Judgment be reversed, and entered for the plaintiff.

Decided,  
Feb. 25th,  
1819.

### Brooke against Barton.

1. Upon a Covenant to make a good title to certain lots of land. (according to a plat for extending the streets of a town,) including the use of the Streets, and appurtenances therein mentioned, and that the Co-  
AN agreement under seal was entered into, on the 8th of June 1804, between *Seth Barton* and *Francis T. Brooke*, by which the former covenanted to make to the latter, “a good, legal and quiet title, in and to six lots  
“or parcels of land, numbered 5, 6, 23, 24, 25, and 26,  
“in the plat made by *Bartholomew Fuller*, extending the  
“Streets of Fredericksburg, according to the said plat,  
“including the use of the Streets and appurtenances therein  
“mentioned, to the said *Francis T. Brooke*, his heirs and  
“assigns forever, in the same degree and manner as if  
“the said lots and streets were a part of the town of  
“Fredericksburg, on which they bind.”  
the Covenantee, his heirs and assigns, may, at all times thereafter, enter into, possess and enjoy the said lots, with the streets, &c.. without the let, hindrance or molestation of the Covenantor, his heirs and assigns; a Court of Equity, by Injunction, will compel the Covenantor, his heirs and assigns, to remove all obstructions by them put in the said streets, and open the same to the free and full use of the Covenantee, his heirs and assigns and permit him and them ever thereafter to use the same, without let, hindrance or molestation, (Cf. *See Truheart v. Price*, 2 *Mif.* 468.

In pursuance of this agreement, *Barton*, by deed of bargain and sale conveyed, "to *Brooke*, his heirs and assigns forever, the said lots, *with the streets laid down in the said plat*;" covenanting in the said Deed, that he "and they might, at all times thereafter, enter into, possess and enjoy the said lots, *with the streets, &c.*, without the let, hindrance or molestation of him the said *Seth Barton*, his heirs or assigns, or of any person or persons whatsoever.

FEBRUARY,  
1819.

Brooke  
v.  
Barton.

Nevertheless, he kept the lots and streets inclosed by fences, and deprived *Brooke* of the full benefit of his purchase; whereupon, the latter exhibited a Bill in the Superior Court of Chancery for the Richmond District, to compel him to remove those obstructions, and to keep open the said streets, and for general relief.

The defendant having been served with process, and failing to answer, a decree *nisi* was entered, and served upon him; and, he still failing to answer, the plaintiff moved for a decree; but Chancellor TAYLOR, "being of opinion that, as the defendant did not undertake to *open the Streets*, he could not be compelled to do it," dismissed the Bill.

From this Decree the plaintiff appealed.

The cause being submitted without argument, Judge ROANE pronounced the Court's Opinion, that the said Decree be reversed with costs; and (*Barton* having died since the appeal, whereupon his executors had been made parties by *scire facias*,) that a decree be entered injoining the appellees, and "those claiming under them, to remove *all and every obstruction* or obstructions, by them *opposed*, by inclosures or otherwise, to the free and full use, by the appellant, his heirs and assigns, of the streets specified in the plat and survey of *Bartholomew Fuller*, filed as an exhibit in this cause, and open the said streets to the free and full use of the said appellant, his heirs and assigns; and that they permit the said appellant, his heirs and assigns ever thereafter to enjoy the use of the said streets, without future let, hindrance or molestation."

Decided,  
March 3d,  
1819.

## Dimmett and others against Eskridge.

1. In trespass for destroying a mill-dam erected by the plaintiff, who gives in evidence the transcript of an Inquisition upon a Writ of *ad quod damnum*, the Court, on the defendant's motion, ought to instruct the Jury that it was incumbent upon the plaintiff to erect his dam in the position prescribed in the said inquisition, and, if they be satisfied that the said dam was erected in a

GEORGE ESKRIDGE brought Trespass *vi et armis* in the Superior Court of Hampshire County, against *Moyses Dimmett* and others, for breaking and entering his close and cutting down his mill-dam; charging also a special injury, that his *credit* was thereby ruined, and a certain *Cornelius Finney*, who, on the credit of said dam, and a mill to be erected and supported thereby, had agreed to lend him a large sum of money, refused to lend him the same.

The defendants pleaded three pleas:—1st, *not guilty*, on which issue was joined:—2d, a special plea, setting forth that the mill-dam was built by the plaintiff, of his own wrong, and without obtaining leave as required by the Act of Assembly, across a stream of water called *Great Cacapehon*, in the said County of Hampshire, which was of right used as a public highway for the purpose of navigation; that the mill-dam unlawfully obstructed the navigation of the said stream, to the great damage and common nuisance of the Citizens of this Commonwealth; wherefore the defendants, in order to abate the said nuisance, peaceably, quietly and without

different position, in consequence whereof a ford across the stream, being part of a public road legally established, was obstructed and shut up, that such dam was a public nuisance and abateable by the defendants.

2. In trespass for destroying a mill-dam, if the defendants plead that the said dam was unlawfully erected by the plaintiff in a ford where a public road crossed the stream, whereby the said road and ford were obstructed, to the great damage and nuisance of the Citizens of the Commonwealth; and that the defendants, in order to abate the said nuisance, peaceably cut down and removed a part of the said dam; and the plaintiff reply, that he did not, by erecting the said dam, entirely obstruct the said public road and ford, and that the Citizens of this Commonwealth were not altogether prevented from passing the same; whereupon issue be joined, such issue is immaterial, and, after a verdict for the plaintiff, ought to be set aside, and a Repleader directed.

3. A partial obstruction of a public highway, is an abateable nuisance.

4. It seems that, in trespass *vi et armis*, a declaration charging, by way of aggravation of damages, a special pecuniary loss, occasioned by the trespass, was good after verdict, even before the Act of Jeofails, which took effect January 1st, 1820.—*See Russel and wife v. Corne*, 1 Salk 119; *Todd and wife v. Redford*, 11 Mod. 264; *Dix v. Brookes*, 1 Stra. 61; and *Newman v. Smith*, 2 Salk, 642.

force, did cut down, break and remove a small part of the said mill-dam; without that they broke and entered the close of said plaintiff; which was the same trespass, &c.; and this they were ready to verify; wherefore they prayed judgment, &c:—3d, another special plea, stating that the mill-dam was, of his own wrong, and without any leave, license or authority, placed by the plaintiff in a public road, and in the ford where the said road crossed the stream called *Great Cacapehon*; that the said public road and ford were thereby unlawfully obstructed; so that the Citizens of this Commonwealth could no longer use the same as they, before the placing and building of said dam, were used to do, and of right ought to do; to the great damage and common nuisance &c.; and that the defendants, in order to abate the said nuisance, peaceably cut down, broke and removed a part of the said dam; without that &c.

Mason,  
1819.

Dimmock and  
others.  
v.  
Bridgde.

To the 2d plea, the plaintiff replied that he did not build and place the said mill-dam across the said stream called *Great Cacapehon*, of his own wrong, nor had the said stream been used by all the Citizens of this Commonwealth, of right, as a public highway, nor did he, by the said dam, entirely obstruct the navigation thereof to the common nuisance of all the said Citizens, &c.; and concluded to the Country.

To the 3d, plea, he replied, that he did not build and place the said mill-dam across the said stream in a public road, then and before that time established by law, and in the ford where the said public road did cross the said stream; nor did he, by the building and placing of the said mill-dam, entirely obstruct the said public road and ford, nor did he continue the same so that the Citizens of this Commonwealth were altogether prevented from passing along the said public road, and passing the said ford, &c.; concluding to the Country, as before. On which replications, issues were joined.

At the trial the plaintiff gave in evidence to the Jury, "to support his declaration," a transcript from the records of Hampshire County, of an Inquisition taken by virtue of a Writ of *ad quod damnum*; whereupon, the de-

MANON,  
1819.  
~~~~~  
Dimmett &
others
v.
Eskridge.

defendants by their Counsel moved the Court to instruct the Jury, that it was incumbent upon the plaintiff to erect said dam in the position prescribed in the said transcript or inquisition; and that if the Jury were satisfied that the said dam had not been erected in the position prescribed, but lower down on the said stream of Cacapehon, and that, by the erection of the said dam in a lower and different position on the said stream, a ford across the same, which was part of a public road or highway legally established, was obstructed and shut up, that such erection by the said plaintiff was a public nuisance and abateable by the defendants; which instruction the Court refused to give; whereupon the defendants excepted: setting forth the transcript aforesaid, in *hæc verba*.

The plaintiff also, "in support of his declaration," offered in evidence a transcript from the records of Hampshire County Court, dated February 1804, certifying that an Inquisition taken by virtue of a Writ of *ad quod damnum* granted on the motion of George Eskridge, was on that day returned, and ordered to be recorded, together with the said Writ; that Thomas Williams was ordered to be summoned to shew cause why the Mill mentioned in said Inquisition and Writ should not be established; but that no subsequent order appeared to have been made respecting the premises:—to the admission whereof the defendants by their Counsel objected, "because it did not thereby appear that the said County Court of Hampshire had given the plaintiff leave to "erect the said mill-dam;" which objection was overruled by the Court, and the said evidence permitted to go to the Jury; whereupon, the defendants filed a second bill of exceptions.

A verdict was found, that "the defendants were guilty in manner and form as the plaintiff against them had alleged; and damages were assessed in his favour, to the amount of \$2250.

The defendants then filed errors in arrest of Judgment; first, that the plaintiff had joined in his declaration an action of trespass and an action on the case, which are

distinct things of different natures, and can not be joined;—2dly, that the issues upon which the verdict was founded were immaterial;—3dly, that the declaration and other pleadings on the part of the plaintiff were otherwise insufficient, imperfect and defective.

These errors, being argued, were judged by the Court to be not sufficient to arrest the judgment, which therefore was entered for the plaintiff. From this judgment the defendants appealed.

Wickham for the appellants.

Stanurd for the appellee.

Judge ROANE pronounced the Court's opinion.

The Court is of opinion that the judgment of the Superior Court is erroneous, in not having given the instruction asked for in the first bill of exceptions; and also, because judgment was given for the plaintiffs on the Verdict, instead of awarding a repleader.

The issue joined on the third plea is immaterial in this, that it is averred that the dam in question did not ENTIRELY obstruct the road in the said replication mentioned, and also that the Citizens of the Commonwealth were not ALTOGETHER prevented from using the same; the Court being of opinion that even a partial obstruction of a public highway is an abateable nuisance.

The Judgment is therefore reversed, with costs, the replication and issue to the third plea set aside, a repleader awarded, and the cause remanded for farther proceedings; with a direction that, in the new trial, the instruction asked for in the first bill of exceptions shall be given, if requested.

MARCH,
1819.

Dimmett &
others
v.
Eskridge.

Decided,
March 9th,
1819.

Spotswood against Douglas.

1. A plea of *non est factum*, in behalf of a person returned as appearance bail, who denies that he ever executed the bail bond, is regular and proper.

IN an action of debt in the Superior Court of Prince George county, brought by *Samuel Douglas* against *Robert Spotswood*, *Norborne B. Spotswood* was returned as appearance bail for the defendant; and a judgment at rules in the Clerk's office was entered against him, as such, in March 1816. At the ensuing term, he moved the Court, (upon his *affidavit* that the bail bond, produced in Court, had never been signed, sealed, delivered or acknowledged by him, but was a forgery,) to direct an issue to be made up to try the fact whether he had actually executed the same, or not;—or to hear testimony to be introduced by him for the purpose of setting aside the said office judgment; but the Court overruled the said motions, to which opinion he excepted;—and thereupon filed a plea, that the said supposed bail bond was not his act and deed; to which plea the plaintiff demurred; and issue in law was joined.—The Court sustained the demurrer, and gave judgment in favor of the plaintiff against the said *Robert Spotswood*, and *Norborne B. Spotswood* as bail for his appearance.

To this judgment a Writ of *Supersedeas* was obtained from a Judge of this Court on the petition of *Norborne B. Spotswood*.

The cause was submitted without argument, and Judge ROANE pronounced the Court's opinion, as follows:—

The Court (not deciding whether the Superior Court did not err in refusing to direct the issue, tendered by the appellant, for trying the fact whether he had executed the bail bond or not,) is of opinion that the plea of *non est factum* thereafter filed, by him, was regularly and properly pleaded; and, the demurrer to the said plea having admitted that the bond in question was not the deed of the appellant, the Court is of opinion that judgment was erroneously rendered against him in the Superior Court.—The same is therefore reversed, with costs; and this Court, proceeding, &c., is of opinion that the law upon the demurrer to the said plea is for the ap-

pellant—and the cause is remanded to the Superior Court;—in which Court the appellee shall be at liberty to require the cause to be sent to the rules, if he chuses, to be proceeded in against the sergeant for omitting to take appearance bail.

Spotswood against Higgenbotham.

Decided,
March, 10th,
1819.

IN a suit at law brought by *Daniel Higgenbotham* against *Robert Spotswood* in the Superior Court of law for the County of Prince George, the Serjeant of the town of Petersburg returned the writ executed, and *Norborne B. Spotswood* bail for the defendant's appearance; whereupon, an office judgment being entered and confirmed, against the defendant, and the said *Norborne* as his bail, the latter filed a Bill in the Superior Court of Chancery for the Richmond District, for an Injunction; averring, that he never was the bail, and never saw the bail-bond until after judgment was rendered upon it.

Higgenbotham, in his answer, stated that, from information received from others, he believed, and hoped to prove, that the Complainant knew, long before the Judgment, and probably before the first rule day, that his name was subscribed to the bail-bond; that, therefore, since he might have defended himself at law, he was not entitled to relief in equity. The respondent further objected that his name was subscribed to such bond; for if, in fact, he did not execute the bond, he had regularly no day in Court, and was

therefore not bound to take any step for his relief in the action at common law.

2. In a case where the remedy at law was considered *doubtful* when the party applied to a Court of Equity, it would be too strict to deny him admittance into that Court for relief.

3. The officer who returned the writ and bail bond, ought, as well as the plaintiff at law, to be made a party defendant to a Bill of Injunction filed by the person returned as bail, who denies that he ever executed the bond; for the officer is interested in the question in controversy, and should be a party, that final and complete justice may be done.

4. In such case, in the same suit in Chancery, a decree may be rendered in favour of the plaintiff at law, (though defendant in equity,) against such officer, if justice should require it.

MARCH,
1819.

Spotswood
v.
Higgenbo-
tham.

served, that if any doubt existed whether *Norborne B. Spotswood* signed the bail-bond, or not, (unless, for want of pleading *non est factum*, he be estopped in equity,) it should be tried by a Jury, because if he is not bail, a Judgment should be rendered against the officer for failing to take bail.

It was now proved by *affidavits*, that the Complainant, before the confirmation of the office Judgment, was informed that his *name was subscribed* to the bail-bond; but it was not alledged in the answer, nor proved, that he actually executed, or acknowledged the same to be his deed.

Chancellor TAYLOR dissolved the Injunction; from which order an appeal was allowed by a Judge of this Court.

May for the appellant.

Upshur for the appellee.

The Court's opinion was delivered by Judge ROANE, as follows:

The Court is of opinion, that as, on the hypothesis that the appellant did *not* execute the bond in question, he had regularly no day in Court in the action at common law, and was, therefore, not bound to take any steps for his relief in the said action; and, as, also, in this case of the remedy at law being considered *doubtful*,⁽¹⁾ it would be too strict to deny him admittance for relief into a Court of Equity, the decree dissolving the Injunction is erroneous.

The opinion of the Court further is, that, as the appellee is probably entitled to his money either from the appellant or from the *Serjeant*, who is therefore much interested in the question now in controversy in this case; and as the *appellee* has been deprived of his remedy by office judgment against the said *Serjeant*, by the rendition of the judgment now enjoined, the interposition of this Court is necessary to give *him* relief; the

(1) Note. See *ante*. the last case, in which the Judge of the Superior Court was of opinion that the person returned as appearance bail, could not plead *non est factum*.

Court is therefore of opinion that the said Serjeant ought to be made a party to the suit, in order to final and complete justice between the parties.

The Decree is therefore reversed with costs, the injunction re-instated, and the cause remanded, to be proceeded in according to the principles of this decree.

March,
1819.

Spotswood
v.
Higgenbotham.

M'Clung against Arbuckle.

Decided.
March 11th,
1819.

A bill penal, executed by *Andrew M'Clung* to *Charles M'Clung*, was assigned by the latter to *Charles Arbuckle*, who brought suit upon it, and obtained a judgment; to stay proceedings on which, a bill of injunction was filed in the Superior Court of Chancery, holden at Lewisburg; whereupon, the said *Arbuckle* brought *assumpsit* in the Superior Court of law for Greenbrier County, against *Charles M'Clung* the assignor, setting forth in his declaration the assignment, the proceedings and judgment in his suit against *Andrew M'Clung* the obligor, and the granting of the injunction, upon a Bill "claiming equitable discounts, against the said writing obligatory, on account of certain dealings and transactions which had taken place between the said *Andrew* and the said defendant, (as was alledged,) before the assignment thereof to the plaintiff;"—"and that the plaintiff was thereby entirely debarred from collecting said sum of money from the said *Andrew M'Clung*"; without stating that the said Injunction was made perpetual, or any proceedings thereon.

The declaration contained also a Count for money laid out and expended and another for money had and received.

The defendant, to the first Count, filed a general demurrer, on which issue in law was joined; but, on argument, the Court overruled it. He then pleaded *non assumpsit*; whereupon, a verdict being found, and judgment entered against him, he appealed to this Court.

1. The assignee of a bond can not recover against the assignor, upon a declaration stating that the plaintiff brought suit, and obtained a judgment, which was enjoined, upon a bill claiming equitable discounts, on account of certain dealings and transactions between the obligor and the assignor before the assignment; and that the plaintiff was thereby entirely debarred from collecting the debt;—without stating that the injunction was made perpetual, or what proceedings took place thereon.

M. v. v.
1819.

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M'Clung  
v.  
Asbuckle.

After argument, by *Wickham* for the appellant, and *Stanard* for the appellee, Judge *ROANE* pronounced the Court's opinion that the judgment be reversed, and entered, for the appellant, upon the demurrer, that the appellee take nothing &c.

Decided,  
March 11th,  
1819.

### M'Niel and Turner against Baird.

1. The point in *Snelson & Co. v. Franklin*, (*ante*) again determined.

2. The right of a bona fide assignee, for valuable consideration, of a note negotiable at the Bank of Virginia to recover against the maker and indorsers of such note, is not to be affected by any equity, of which he had no notice when he received it.

UPON a Bill filed by *Herbert Baird* against *Hector M'Niel*, stating similar grounds of equity to those on which *Franklin* relied in his Bill against *Snelson & Co.*, (see *ante*.) Chancellor *TAYLOR* granted an Injunction to restrain and enjoin the defendant, his agents, &c., from paying, endorsing away, or in any manner enforcing the collection of, three notes negotiable at the Bank of Virginia, executed by the plaintiff to the defendant, amounting in the whole to eleven hundred dollars, and payable as described in the order.

It appearing from the answer of *M'Niel*, that the notes had been assigned by him for value received before the Bill was filed; *Samuel Turner* the assignee was made

3. If the maker of a note negotiable at the Bank of Virginia, file a Bill of Injunction against the payee and his assignee. on the ground of an equity affecting the payee only, the Court of Chancery, having before it all the parties concerned, ought not to discharge the maker altogether, nor to turn over the assignee to a suit at law against the payee, but should decree against the latter, in the first instance, that he pay the amount of the note to the assignee and the costs at law; and liberty should be reserved to the assignee to apply to the Court to dissolve the Injunction as to the maker for so much of the said debt as he may not be able to recover from the payee; in which case a decree ought also to be rendered in favour of the maker against the said payee for so much thereof as he may be compelled to pay as aforesaid. And the decree should further direct, that the action at law in favour of the assignee against the payee, if any be pending, be perpetually enjoined, except as to the costs.

4. In such case the payee should pay to both the other parties, their costs in Chancery, and in the Court of Appeals, upon an appeal taken by himself and the assignee; in the decision of which, both the other parties substantially prevail.

5. A Court of Equity may decree in favour of one defendant against another; in a case where the same decree operates in favour of the Complainant, by subjecting, in the first instance, that defendant who ought ultimately to pay the debt.

also a defendant, by an amended Bill; and another Injunction was awarded, to restrain and enjoin him, his agents, &c., from proceeding to enforce, by suit or otherwise, the payment of those notes.

MARCH,  
1819.

McNiel and  
Turner

v.  
Baird.

Turner by his answer said, that he received the notes in question, for a valuable consideration, long before the Court had awarded an Injunction to prohibit their collection, and without knowing that there was any equity against them; and "is advised that there can be no set-off or equity against a note negotiable at the Banks of "Virginia."

The equity in the Bill, *against the defendant McNiel only*, was fully supported by testimony.

The Chancellor made the Injunctions perpetual; reserving, however, to the defendant Turner the liberty of proceeding at law, for the recovery of the amount of the notes, *against the other defendant*; and decreed farther that the defendant McNiel pay to the plaintiff his costs.

From this decree, both the defendants appealed.

May for the appellants.

Leigh for the appellee.

The following was this Court's opinion, delivered by Judge ROANE.

The Court is of opinion that, as between the appellant McNiel and the appellee, the latter is entitled to recover back the amount of the notes in controversy; on the principle, and for the reasons, on which relief was given by this Court in the case of *Snelson v. Franklin*. As between the appellee and the appellant Turner, however, the former as well as the said McNiel is responsible for the payment of the said notes to the said Turner; they having passed into his hands, and being placed on the footing of foreign bills of Exchange by our statutes made in relation thereto: and, both these parties, so liable to the demand of Turner, being before the Court, the Court is of opinion, that a decree ought to have been rendered in his favour, subjecting the appellant McNiel, in the first instance, to the payment of the said notes; he being the principal debtor. The decree before us is therefore erroneous, so far as it *discharges* the appellee

MARCH,  
1819.

~~~~~  
McNiel and
Turner
v.
Baird.

by perpetuating the injunction as to him: it is also erroneous in turning over the appellant *Turner* to a suit at law against *McNiel*, instead of decreeing against him in the first instance. The opinion of the Court therefore is, that a decree ought to be rendered in favour of *Turner* against the appellant *McNiel* for the amount of the said notes, with interest and the costs at law; and that liberty be reserved to the said *Turner* to apply to the Court of Chancery to dissolve the injunction, as to the appellee, for so much of the said debt as he may not be able to recover from *McNiel*; in which case, a Decree ought also to be rendered in favour of the *appellee*, against the appellant *McNiel*, for so much thereof as he may be compelled to pay as aforesaid: and that the action or actions at law, now pending against the appellant *McNiel*, in favour of the other appellant, if any such there be, be perpetually enjoined, except as to the costs thereof.

In thus decreeing in favour of one *defendant* against the *other*, we not only decree substantially in *his* favour, by subjecting in the first instance to his claim another defendant, and giving him an immediate decree against him, but we also decree in favour of the *plaintiff*, by interposing, between him and *Turner*, that defendant who ought ultimately to pay the debt.

The decree is to be therefore reversed, and the cause remanded, to be finally proceeded in pursuant to the principles of this Decree; and, both the other parties having substantially prevailed against the appellant *McNiel*, he is to pay the costs, as well in this Court, as in the Court of Chancery.

Early against Owen.

Decided
March 24th,
1819.

THIS was an action of debt, in the Superior Court of Montgomery County, upon a three months' replevy bond given upon a distress for rent. The condition of the bond, (which bore date the 21st of September 1812,) stated that the distress was levied, for the obligor *Jacobus Early's* failing to pay the rent, amounting to 100*l.* with interest thereon since the 25th December 1811, and costs amounting to \$12 92 Cents; that he had tendered *Thomas Watterson* as security for the payment of the above sums at the end of three months; on which the property distrained was restored to the debtor; and the obligation was to be void on payment of the said Rent, within three months, with the interest and costs aforesaid, to the obligee *Thomas Owen*, his heirs or assigns.

The declaration was in conformity with the bond.— The defendants craved *oyer*, and demurred generally; whereupon issue in law was joined. The Superior Court overruled the demurrer, and entered judgment for the plaintiff, for the penalty, to be discharged by the payment of 100*l.* with lawful interest from the 25th day of December, 1811, 'till paid, and \$12 92 Cents, and the costs. From which Judgment, the defendant *Early* appealed.

Stanard for the appellant.

Leigh for the appellee.

Judge ROANE pronounced the Court's opinion.

The Court is inclined to think that the bond declared on in this case is not a good bond under the statute; in this; that it gives *back* interest from the time when the rent became due, and does not merely commence that interest from the date of the Bond. But it is unimportant whether it be good as a statutory bond, or not. In either case, an *action* lies upon it, according to the uniform decisions of this Court. The giving a summary remedy by *motion* does not annul the pre-existing remedy by *action*; but either may be pursued (in relation to a good statutory bond) at the election of the party. With res-

1. An *action of debt* may be brought upon a three months' replevy bond for rent, tho' it give *back* interest from the time when the rent became due, and not merely from the date of the bond; which circumstance, the Court were inclined to think, makes it not a good bond under the Statute. See Acts of 1792, edit. 1794, 1803 & '14, c. 89. § 1; & R. Code of 1819, c. 113, § 1, Vol. 1. p. 446: *Beale v. Downman* &c. 1 Call 249; *Booker's ex'ors v. M^r. Robert* &c. *executors of Coutts, Ibid.* 243; *Hewlett v. Chamberlayne*, 1 Wash. 367.

pect to the *back* interest; as the bond stipulates for its payment, and there is certainly nothing unjust in the stipulation, the Court sees no objection to its recovery in this action, and affirms the judgment.

Decided,
March 27th,
1819.

Taliaferro against Gatewood.

1. The whole proceeding upon a demurrer to evidence, is under the control of the Court before whom the trial is had. If, therefore, by mistake or otherwise, a material fact, on which the point in issue depends, and which the Court judicially knows to exist, be omitted in such demurrer, it ought to be set aside, as too uncertain for a judgment to be given thereon; and this, upon an appeal taken by either party.

ANNE GATEWOOD brought *assumpsit* in the County Court of Caroline against *John Taliaferro*; setting forth in her declaration that the defendant, on the 22d day of October 1804, assigned to her a writing obligatory, of a certain *John Baylor* to the said defendant:—(describing it;) that, by the said assignment, the defendant became bound to the plaintiff, that, in case the amount of the said obligation could not be recovered of the said *John Baylor*, she the said plaintiff using due diligence to recover the same, that then the said defendant should make good the same, and pay the amount thereof, to the plaintiff:—that, subsequent to the said assignment, (without saying when,) she instituted a suit thereupon in the District Court of Fredericksburg, which she duly prosecuted until the 11th day of May 1808, when, the said *John Baylor* having departed this life, a *scire facias* was ordered to be issued against *Thomas R. Rootes* administrator with the Will annexed; and the said *scire facias* was regularly returned executed; that, afterwards, at the final hearing and trial, it was found by the Verdict of a Jury that the said *Thomas R. Rootes* had fully administered, and had not then, nor on the day of the commencement of the said suit, nor at any time thereafter, any assets to pay the said debt; and therefore it was considered by the Court that the plaintiff take nothing, &c;

2. In an action by the assignee against the assignor of a bond, the point in dispute being whether the assignee has used due diligence in suing the obligor; if the plaintiff produce a transcript of the proceedings in a suit which he brought against the obligor, showing the time when the declaration was filed, but not the date of the Writ; and the defendant demur to the evidence; the Court not interfering nor requiring a copy of the Writ to be produced; such demurrer should be set aside, and a *venire de novo* awarded.

said obligation became bound to pay to the plaintiff the amount thereof, with Interest and the costs of the said suit; and the said defendant, being so liable, did in consideration thereof assume, &c.

MAVEN,
1819.
Taliaferro
v.
Gatewood.

At the trial, on the plea of *non assumpsit*, the plaintiff, to support the issue joined on her part, offered a transcript of the proceedings in the said suit, brought by her, as assignee of the writing obligatory aforesaid, against John Baylor the obligor; which transcript shewed that the declaration in that suit was filed on the 29th day of April 1807; but the date of the Writ previously issued did not appear. The defendant demurred to the evidence, and spread on the record the said transcript, the writing obligatory, and the assignment, which was proved to have been made by the defendant. The plaintiff joined in demurrer; and the Jury found a conditional verdict.

The County Court entered judgment for the defendant, which, upon an appeal to the Superior Court of law, was reversed; that Court being "of opinion that the assignee of the writing obligatory in the record mentioned *did use due diligence* in endeavouring to recover the amount thereof from the obligor and his representative by a judicious mode of prosecution; and that a want of due diligence could not be imputed to the assignee from a failure to sue the obligor at an earlier period; seeing that the assignor did not request or call upon her to commence such suit, and that no evidence is produced by the assignor Taliaferro to shew that an earlier prosecution would probably have been more effectual than the one which was carried on by the said assignee."

The Superior Court, for these reasons, entered judgment for the plaintiff; to which the defendant obtained a writ of *Supersedeas* from a Judge of this Court.

Stanard for the appellant.

Call for the appellee.

Judge ROANE pronounced the Court's opinion.

This is an action brought by the appellee, as assignee of a bond, against the assignor, on the ground of not being able to recover it's amount from the obligor, altho'

MARCO,
1819.

Taliaferro
v.
Gatewood.

she had used due diligence to recover it from him. Issue was joined on the plea of *non assumpsit*; and the question whether due diligence had been used or not, is directly in issue between the parties. It is that question upon which the decision of the cause is entirely to turn.

At the trial, a demurrer to evidence was tendered by the defendant, and joined by the plaintiff. The demurrer sets out a record of a suit, by the appellee against *Baylor* the obligor, in the District Court. This record states the time of *filing the bill*, but is wholly silent as to that of taking out the writ, although it is evident that *that* Epoch may be very important on the question in issue between the parties. On that Demurrer a Judgment was rendered in the County Court for the defendant. Had it been shewn that the suit had been instituted at an earlier day, (as doubtless it might,) the decision on the demurrer might have been different. The Judgment of the County Court was reversed by the Superior Court, and judgment rendered for the debt.

It is a principle that "the whole proceeding upon a Demurrer to Evidence is under the control of the Judge, before whom the trial is had;" *Gibson v. Hunter*, 2 *H. Bl. rep.* 208; so the notes of the testimony are taken down by the Judge or his associate, and signed by Counsel. *Buller's N. P.*, 313; 5 *Bac.* 468. If that be the case, the Court should require *that* fact to be stated in the Demurrer, on which alone the point in issue must depend, and which the Court judicially knows has an existence. The Court judicially knows that every declaration is founded on a Writ, and that the latter is prior in point of time to the former. If, owing to mistake or other causes, this material fact be omitted, without which the merits of the case can not be decided, and *that* thro' the default of the superintending tribunal, (the Court,) it ought to be corrected for the sake of justice, and on the principle, that it is incident to a Court to correct its own errors. If a Court has power to set aside a case agreed, which is the act of the parties, or a special verdict, which is the act of the Jury, because they omit to find facts material to the decision of the point in issue,

MARCH,
1819.

Taliaferro
v
Gatwood.

it would seem to have that power *a fortiori* in the case before us; in a case in which the fault is in some sense it's own. But this point does not rest on general reasoning. It is laid down in the case of *Cocksedge v. Fanshaw*, (*Dougl.* 132,) that the reason of resorting to a Demurrer to Evidence, is "because the Jury may refuse to find a "special verdict, and then the facts never appear "of record; but that, whether the case comes before the "Court on a *demurrer to evidence*, or a special verdict, "the law is the same:" that is, as we presume, the *necessary* facts must be shewn in the former case, as well as in the latter. The case before us being of a *record*, in which, it is judicially known to the Court that a Writ existed, and *preceded* the filing of the bill, our decision will have no effect as to cases in which ulterior evidence may or may not exist, and in which it is not certainly known to the Court that it does exist. In such cases, the party must abide by the testimony he has exhibited. But, in this case, the Court, for it's own sake, and in order to get at the real merits, should have called for a fact, which it judicially knew had existence, and for want of which, a decision contrary to the right of the cause may have taken place.

The Court in this case should say, as it has often said in relation to special verdicts, and as it did in relation to an agreed case in *Brewer v. Opie*, 1 *Call* 214, that the same were, respectively, too uncertain for a *judgment to be given thereon*. It ought to say, as was said, in effect, in the case of *Gibson v. Hunter* in the House of Lords in England, (2 *H. Bl.* 207,) that this demurrer has been so *negligently framed* that there are not the necessary facts, *on which a judgment can be founded*. It ought to say, as was said in the last mentioned case, that a *verdict de novo* ought to be awarded, because "*the issue joined between the parties, in effect, has not been tried*." It has not been tried by the *Jury*, owing to it's translation to the forum of the *Court* by the demurrer; nor by the *Court*, for the want of the necessary facts whereon to ground it's decision. In this case, therefore, as in that, and in the case of *Wright v. Pindar* quoted in it, the De-

MARCH,
1819.

Taliaferro
v.
Gateswood.

murrer should be set aside, and a *venise de novo* awarded.

The Judgments of both Courts are therefore to be reversed, the demurrer to evidence set aside, and a *venise de novo* awarded. We do not regret that the cause thus goes off without a decision on the merits. The points embraced in those merits are very important, and we hope may hereafter receive the consideration of a fuller Court.

Judge COALTER, dissenting, delivered the following separate opinion.

The first important question in this case is, whether, upon the state of the evidence given for the plaintiff, it was competent to the defendant to insist upon the Jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer?

The evidence offered by the plaintiff, except proof that the appellant assigned the bond to her, was the record of the suit which she, as assignee, had prosecuted against the obligor and his administrator. This presented a naked case, unaccompanied by any circumstances, on either side, other than those appearing in the record, of a delay by an assignee to sue for upwards of two years after the assignment; and the question for the Court to decide was whether such delay exonerated the assignor?

It is said, however, that the record in this case is defective as it begins with the filing of the declaration, and shews that the party had been arrested on a writ theretofore issued; and as this writ may have been an important part of the plaintiff's proof, as there may have been various writs of *capias*, *alias*, *pluries*, &c., it may be the fact that the suit was instituted long before the filing of the declaration,—that the Court who pronounced the law on this demurrer judicially knew this possibility, and therefore the evidence was so incomplete and uncertain that no judgment could be given in the case, and a *venise de novo* ought to have been awarded.

My strong impression is that, if the date of the Writ was really material to the party, (as, from the certificate of the Clerk relative thereto, but which is no part of this record, I incline to think it was,) and if the party, by the neglect of the Clerk, in not giving the whole record from the emanation of the Writ, was taken by surprise, (as I think also probable,) her remedy, when on the argument of the demurrer this defect appeared, was a motion for a new trial to the Court who tried the cause.—This course surely would have been more proper, than to have insisted, in that Court, on a defect in her own evidence as a ground why the Court should not have proceeded to a judgment on the demurrer.

Mason,
1819.
Taliaferro
v.
Gatwood.

If the party did not choose, however, to insist on either of these matters in the County Court, or to urge the latter in the Superior Court of law, was it the duty of those Courts, *ex-officio*? or is it within the power of this Court, when the point is made, to say that this defect in the plaintiff's own testimony renders it impossible that judgment should be given in the case?—What is the object and nature of a demurrer to evidence?—The object of it is, as in a special verdict, or case agreed, to submit the law arising upon the facts of the case to the Court, and not, by blending it with the fact, to submit the whole to the Jury.—The demurrer too has this advantage, that, whereas the Jury may not agree to find a special verdict, the case may be withdrawn from them without this hazard.—The nature of a demurrer tho' is not to invest the Court with the trial of the fact.—The existence of the facts in proof to the Jury, or such as they may fairly infer from the evidence before them, must be admitted; and then the demurrer to evidence is, in its nature, like a demurrer to a declaration or plea. (a)—In the latter case, the demurrant says, admitting the truth of what is stated in your declaration or plea, you have no cause of action, or your defence is not good.—The party, however, whose declaration or plea is thus demurred to, would not be heard to say that the Court could not give judgment in the case because the declaration or plea shews that *possibly* a cause of action or a good de-

(a) 2 M
Bl. 206.

Mancu,
1819.

Taliaferro
v.
Gatewood.

fence may exist, altho' it is not stated so as to avail against the demurrer.—So, the party demurring to the evidence says, admit this to be true in it's full extent, yet it is insufficient in law.—Can the party offering the evidence say, true it may not be sufficient, but I do enough to shew that there is other evidence which *may* be sufficient, and therefore the Court can not give judgment against me?

In *Gibson & Johnson v. Hunter*, 2 H. Bl. 206, (to which I would solicit the attention of the Bar, as affording the clearest and most unobjectionable course to be pursued in relation to demurrers to evidence, a subject which, in this country at least, is one of no little perplexity,) it is said that, “if a matter of record, or other matter in writing “be offered in evidence in maintainance of an issue joined, the adverse party may *insist* on the jury being discharged from giving a verdict, by demurring to the evidence, and *obliging* the party offering the evidence to “join in demurrer.”—He is *obliged* to join in demurrer, “because there can not be any variance of matter in writing.”—“Parole evidence too is sometimes certain, and “no more admitting of any variance than a matter in “writing; but it is also *often loose and indeterminate, and “often circumstantial.*” The case then goes on to shew how evidence of this latter description, and even where it is merely *circumstantial*, may be demurred to; viz. by the demurrant *admitting* the existence of the fact, the evidence of which is loose and indeterminate, or of that which the circumstances offered in evidence conduced to prove.

(b) Dougl.
133. In this Country, according to our practice, and also, as I understand, in England, (b) when the evidence is such as *certainly* to warrant a jury in inferring a particular fact, the Court will *consider* such fact as *admitted*: by the demurrant; but certainly the better plan is that recommended in the case from *Henry Blackstone* above cited, to have the facts, arising from the inferences and circumstances, stated and admitted of record, under the control of the Court, who will see that nothing shall be

insisted on, which the Jury might not properly infer from the facts before them.

The evidence in that case was of this last description, that is, *circumstantial*; and the Judges certified to the Lords, that it was not competent for the party to demur, and discharge the jury from giving a verdict, *without distinctly admitting upon the record every fact and every conclusion which the evidence given for the plaintiff conducted to prove.*

In the case before us, however, the evidence is of two kinds:—first, the record: to this the defendant could not object as improper to go to the Jury: had he made the objection to it, now set up, and the plaintiff had waived the benefit of the proceedings prior to the filing the declaration, and had chosen to rely on such a record as would clearly have been a full record in a Court of error, the objection could not have been sustained. It was then *legal evidence*, and was *offered* to the Jury. The second kind of proof was *parol*; the *assignment* was proved by a Witness; and this is admitted.

What was the defendant to do? He must either submit both law and fact to the Jury, have a special verdict found, or demur to the evidence. He chose the latter. This he had a right to do. If he had not done so, the plaintiff had a right to submit the law, and the facts thus in proof, to the Jury, and the Court could not say that the case should not go, on those proofs, to the Jury, because, *peradventure*, the party *might* make his proofs better. If the Court, in that stage of the case, could not have prevented the plaintiff from proceeding against the defendant with her proofs so offered, or if the plaintiff, in that stage of the cause, could not have prevented the defendant from availing himself of the want of sufficient proof of diligence in prosecuting that suit, and obtaining a verdict in his favour on the evidence so offered, and if her only remedy would have been to move for a new trial, (on the ground of surprise,) after the verdict; neither could she, then or now, prevent the defendant from demurring, and having the full benefit of that demurrer, unless by a motion for a new trial, which, before

MARCH,
1819.

Taliaferro
v.
Gatewood.

MARSH,
1819.

Talbot

Gatwood.

judgment on the demurrer, it might have been competent for her to make, as above suggested.

If such must have been the course in the Court trying the cause, the same must be pursued here; with this exception, that such motion for a new trial cannot be made here.

This question, however, being in the opinion of the other Judges with the appellee, in consequence of which a *venire de novo* must be awarded, no opinion will be given on the demurrer.

Alexander's Heirs against Coleman and Wife.

Decided,
March 31st,
1819.

1. Upon a Bill for partition of land; a person who claims part thereof by adverse title, being made one of the defendants, for the purpose of obtaining a surrender of title deeds, and a conveyance of such part, from him, if the Court decree against him, that the said deeds "be set aside and declared void, and that the title of the complainants to the lands in the bill mentioned, be quieted, and, by consent of parties, the cause be continued as to the other defendants; *quære*, whether such decree be *final*, or *interlocutory* as to him?

In September 1808, the County Court, on consideration of the Bill, Answers, "Depositions and Exhibits in the case, ordered and decreed, that certain Deeds of Alexander, be set aside and declared void, and that the title of the complainants to the lands in the bill mentioned, be quieted, and, by consent of parties, the cause be continued as to the other defendants; *quære*, whether such decree be *final*, or *interlocutory* as to him?"

2. *Quære*, whether an appeal cannot be taken *as of right*, from a decree which is *final* as to one of the defendants, whose claim is *adverse* to that of the plaintiff, and all the other defendants as to whom the cause is continued in Court? (1)

(1) Note. As to the right of appeal from *interlocutory* decrees, see Acts of 1815, c. 8. § 1, 2, 3; 1806, c. 23. § 2; R. Code of 1819, c. 6. § 55, 56, 57. Vol. 1st p. 207—8.

"Lease and Release from *William Elliott* to *John Hough*,
 "from *John Hough* to *Samuel Butcher*, and from *John*
 "*Butcher* the heir at law of *Samuel Butcher* to the de-
 "fendant *John Alexander*, so far as the same were in-
 "tended to convey any title to the land in the Bill men-
 "tioned, to the several grantees, be set aside, and de-
 "clared void, as to the effect aforesaid; and that the
 "title of the Complainants to the lands, in the said Bill
 "mentioned, be quieted: and, by consent of parties, it was
 "ordered that the cause be continued as to the other defen-
 "dants." From which order and decree, the defendant
Alexander appealed to the Superior Court of Chancery
 for the Richmond District.

MARCH,
 1819.
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 Alexander's  
 heirs  
 v.  
 Coleman and  
 Wife.

On the 20th of February 1811, Chancellor TAYLOR  
 pronounced the following Opinion and Decree in the  
 cause.

"In *Mackey v. Young and Wife*, it was my opinion  
 "that, where a decree took from one, and gave to ano-  
 "ther, the whole, or any part of the subject in contro-  
 "versy, it should be so far regarded as final, that an  
 "appeal might lie to this Court; but the Court of Ap-  
 "peals decided otherwise; and therefore the appeal in  
 "that case was dismissed: and, for the same reason, the  
 "appeal in this case must be dismissed: for this is not  
 "a stronger case than that of *Donald* against *Nash*,  
 "which went from this Court to the Court of Appeals.  
 "In that case, *Nash* filed his Bill in this Court against  
 "*Donald*, a foreign debtor, and attached his effects or  
 "debts here, in the hands of several garnishees: the  
 "cause was finally heard, and decree against *Donald*,  
 "for the amount of the plaintiff's claim, with directions  
 "to all the garnishees but one, to pay the sums in their  
 "hands towards satisfaction thereof; and liberty was re-  
 "served to the plaintiff, in the event that it should be  
 "necessary, to resort to this Court against the other  
 "garnishee. This Court, it is admitted, may grant ap-  
 "peals in some cases from interlocutory decrees; but the  
 "Judge in vacation granted an appeal to *Donald*; and the  
 "Court of Appeals, going upon the ground that the de-  
 "cree, because of the reservation, was interlocutory, and



MARCH  
1819

Alexander's  
heirs

Coleman and  
Wife.

"could not be granted by the Judge in vacation, dismissed the appeal. Now that case was as final as this: for some of the garnishees paid the money in their hands under executions which issued upon the decree against them; and yet, if *Donald* could not appeal, they could not; for, if the decree had been final, then the appeal lay, and the Judge in vacation might have granted it: but the County Courts never had the right to grant appeals from their interlocutory decrees: and, since this decree, according to the case of *Donald v. Nash*, is interlocutory and not final, this Court can not entertain the present appeal; for the Court below reserved to itself a control over other parts of the subject of the suit, besides those finally decided upon. And therefore this Court doth adjudge, order and decree that the present appeal be dismissed, as having been improvidently granted; with this direction, that the cause be again docketed in the Court below, in order that that Court may proceed to a final hearing of the same in all respects."

From this decree an Appeal was allowed, on petition to the Court of Appeals.

*Stanard* for the Appellants.

*Wickham and Call* for the Appellees.

March 31st 1819, the Judges delivered their Opinions *seriatim*.

Judge COALTER. The Bill in this case was filed by *Coleman* and wife, to have partition of lands between the female plaintiff and her two brothers, *Johnson* and *George Cleveland*, agreeably to the Will of their father; alledging that, though, by that Will, her mother was empowered to divide the estate, yet it was intended that an equal division should be made, which was not done, she having devised to the plaintiff a much less share; wherefore an equal division is claimed.

As to a part of the land, however, in which they thus claimed partition, it is alledged that it formerly belonged to one *William Elliott* who sold and conveyed it to *John Hough*; but, for certain reasons, it was agreed between them to rescind the contract; after which, *Elliott* sold and

conveyed to *James Cleveland* the father of the female plaintiff; that *Hough* never re-conveyed, but, on the contrary, fraudulently sold and conveyed it to one *Butcher*, whose son and heir sold and conveyed it to *Alexander*; wherefore the Bill also demands a delivery of the title deeds, and a decree that *Alexander* shall convey.

MARCH,  
1819.

*Alexander's*  
heirs  
v.  
*Coleman and*  
Wife.

As it regards *Alexander* then, his rights were equally in conflict with those of the female plaintiff and her brothers. Indeed, if she should be found entitled to no more than the quantity of land devised to her by her mother, the brothers alone would be interested in the dispute with him, as her claim could be satisfied out of the other moiety hereafter mentioned, there being more than enough for that purpose. The answers of the brothers express a perfect willingness to have the partition made, in such way as the Court may say she is entitled to, under the Wills of their father and mother.

It became necessary then, before any decree for partition, that the subject to be divided should be first ascertained. It was proper, too, that this should be settled definitively and finally, if possible, as a re-adjudication and alteration in this respect, when the final decree for partition is about to be made, would inevitably require new reports and allotments! But, in this particular case, such final decree, as to this matter, was more especially called for, because, as I understand the case, *William and Robert Elliott* held each an undivided moiety of a tract of land, of which *William* sold and conveyed his moiety as aforesaid, and the legal title to which became vested in *Alexander*:—the bill states that *James Cleveland* the father purchased from both *Robert and William Elliott*, and so became entitled to the whole tract. Now, if *Alexander's* title should remain firm, then a partition would first be necessary between the female plaintiff and her brothers, on the one part, and *Alexander* on the other, so as to sever the moieties; whilst, on the other hand, if his claim is put out of the way, the whole tract could be divided. It was therefore expedient, if not absolutely necessary, that this preliminary question should be finally settled, before proceeding to decide and adjust

March,  
1819.

Alexander's  
heirs  
v.  
Coleman and  
Wife.

the rights of the parties claiming to have partition amongst them of this subject.

The cause was therefore heard on this point, and a decree pronounced, that the deed from *William Elliott* to *Hough*, that from *Hough* to *Butcher*, and that from the heir of *Butcher* to *Alexander*, so far as those deeds convey any title to the land, be set aside, and are declared void, and that the title of the plaintiffs to the land in the bill mentioned be quieted. The decree then proceeds,—  
“and by consent the cause is continued as to the other defendants.”

This decree then, as it regards *Alexander's* title to the land, avails as much to quiet the other defendants as the plaintiffs, and was certainly intended to be final and conclusive as to *Alexander*, as he is dismissed from the Court, the cause being continued as to the other parties only.

A defendant (I apprehend) may be sent out of Court, as well when there is a decree against him, as when there is one in his favour, dismissing the bill as to him:—the decree may, in so many words, put him out of Court, or, as in this case, may do it, by decreeing against his rights, in a case in which he was entitled to partition and to be considered even as a plaintiff if his rights had not been rejected, and continuing the case *only as to the others*, so as to give him no longer a day in Court.

But, if the decree had been *in his favour*, and the bill dismissed as to him, and if the other parties could have appealed from such dismissal, as I think I can shew not only from reason but precedent, then I think it follows that he could also when the decree is *against* him.

Partition ought not only to be made of the whole subject, but in a way least calculated to reduce the value of the various parts; and though it may sometimes happen that subjects lying detached must each be divided, yet it rarely happens that an entire tract ought to be split into double as many pieces as there are claimants. The subject to be divided ought therefore to be ascertained before the final decree; and had *Alexander* been dismissed from Court, or a partition made, and a moiety decreed

to him, how could these parties have moved a re-hearing as to that moiety, so as to have it divided amongst them, without bringing him, or his heirs, in case of his death, which has happened, into Court? This (I apprehend) they could have done, only by bill of review and sub-pœna. Or suppose, in this case, *Alexander* had not appealed, but, on the final hearing, the parties had wished to alter the decree, so as to compel him or his heirs to convey; could they have obtained such amendment without bringing him or his heirs into Court?

The case of *Gaines v. Fulcher*, which I believe is not reported, and the case of *Ball's devisees v. Ball's executors and widow*, 3 *Munf.* 279, are precedents in support of my position. The former was a suit to subject mortgaged slaves, in possession of *Fulcher* and others, to the payment of the debt for which they had been mortgaged; and the Bill was dismissed as to *Fulcher*. The plaintiff appealed. This was necessary, I apprehend, not only to preserve the lien on those held by *Fulcher*, but to subject them to a payment of a due proportion of the debt, in aid of the other defendants, should they be ultimately held liable; and, altho' the question as to the finality of the decree was not argued, yet, as that case came on to be heard shortly after the appeal in this case was granted, the point was not unattended to by me. I find this memorandum in my note of that case. "But is not this an interlocutory decree, the case not being out of Court as to all the parties? See *Alexander v. Coleman* &c., now depending, on a similar point. I wished that case argued before this was decided, but was told that case would go off on another point." The point then was made to the Bar, who declined arguing it; and I find this farther note:—"I think this a final decree as to *Fulcher*, and am willing to take it up on the other points."

From this opinion I should now feel perfectly willing to depart, had it even been made up after argument of the point, were I satisfied it was incorrect; but I am confirmed in it's rectitude by the other case. The Bill in that case was filed to have a settlement of the Execu-

MARCH,  
1819.

*Alexander's*  
heirs  
v.  
*Coleman and*  
Wife.

March,  
1819.

Alexander's  
heirs  
v.  
Doleman and  
Wife.

thor's account, and a distribution of the slaves and other personal estate amongst the plaintiffs; they insisting that, by a settlement on the widow, she was barred of any claim thereto. It appeared, however, that a decree of the County Court, never appealed from or reversed, had affirmed her right to a share of the *whole personal estate*. It also appeared that she had received her share, and no more than her share, in the slaves; she had also received, as the Executor alledged in his answer, a part, (whether too much or too little does not appear,) of the other personal estate. The Chancellor dismissed the Bill *in toto*, as to her; and the plaintiffs appealed. The dismissal of the Bill as to her, so far as it regarded the slaves, was affirmed. But as no settlement of the other fund had taken place, and as it might turn out that she had received too much, or too little, of that fund, and as all persons interested in the surplus must be before the Court before a decree as to it; as it would have been error to have decreed as to it without the proper parties; and as one of those parties was dismissed, *in toto*, from the Court, and the dismissal as to her placed the cause in such a situation as that no correct final decree could be pronounced; it was reversed for that error. It is true she might have been brought back into Court, by a bill of review; but, if that had been rejected, then the parties must have taken a decree confessedly erroneous, or must rectify this first error by appeal: but if a bill of review could have been filed for this purpose, an appeal would equally lie.

I am the more confirmed in this opinion, because the cases heretofore decided to be interlocutory, are cases in which *all the parties remained* in Court, and in which it was competent for them, by motion, to have a re-hearing, and a correction of the decree; and this capacity to move a re-hearing, I understand to result from the consideration that the parties remained in Court. (a)

(a) Temple-  
man v. Step-  
ton, 1 Munf.  
352; Al-  
drige v.  
Giles, 3 H.  
& M. 136.

But if a plaintiff who continues in Court until the last decree, may appeal from a dismissal of his Bill as to one party, (whether rightfully or wrongfully dismissed,) because it is final as to his claim against that party, against whom he can have no decree on the final hearing

without bringing him again into Court, I should think it followed, *a fortiori*, that the party decreed against and turned out of Court, (altho' wrongfully and erroneously turned out,) and who consequently would be no party to the last decree, could appeal.

MANON,  
1819.  
Alexander's  
heirs  
v  
Coleman and  
Wife.

If I am correct in these premises, it only remains to make some farther remarks corroborative of the opinion heretofore advanced, that this decree concluded *Alexander's* rights, and dismissed him from the Court. If it did all this, it is a final decree, by which he may consider himself aggrieved; and consequently he may appeal from it.

I think I have sufficiently proved that, in order to a correct ultimate decree of partition, the Court ought to have made a final decree as to *Alexander*. Suppose the Court had expressly declared, that, as a necessary means to a correct decree between the other parties, it was indispensable to hear this case in the first instance; and to decree therein finally, as between the female plaintiff and her brothers, considering them all as plaintiffs in partition on the one side, and *Alexander* on the other, and had decreed that he should convey the moiety claimed by him to them, and pay them their costs; or suppose, (what is no more than the same case a little differently stated,) that all the devisees had united, as plaintiffs, in the Bill, had made the same statement as to *Alexander's* title, had called for a conveyance from him, and a division amongst themselves, of the whole tract, or, if his title should be found good, that a partition should be made between them and him into moieties, and then a division of the moiety between them; and the cause had been heard between them and him, *prefaced as above stated*, and he had been decreed to convey to them and pay the costs; could any doubt exist as to the finality of either of these decrees, as it regards the rights of those claiming partition on the one side, and *Alexander* on the other.

But, when the Decree in question was pronounced, it was equally proper that it should be final in it's character as in the case last above supposed. We will not suppose then that the Court intended to make an improper

MARCH,  
1819.  
Alexander's  
heirs  
v.  
Coleman and  
Wife.

Decree in any respect. They go on to settle the rights of *Alexander*, and to annul his title. It is true they don't direct him to convey:—the plaintiffs, perhaps being of opinion that, as their ancestor had a conveyance from *William Elliott*, if the other conveyance from him was delivered up and declared void, they would hold under a better title, (having perhaps a general warranty from him,) than by a conveyance with special warranty from *Alexander*. But, be this as it may; they had a right to be satisfied with the decree in its present form. They had a right to believe that, if the deed was delivered up or declared void, it could never be produced in evidence against them, and that a copy could not, the original not being lost, but cancelled; and that this decree would be equal to cancelling or vacating a prior patent in favour of a subsequent patentee.

As to costs, all that can be inferred, from the silence of the decree in that respect, is, that, as costs are in the discretion of the Court, they did not choose to make him pay costs, which it might have been difficult to adjust, as he certainly ought not to have paid the whole, when part was incurred in consequence of the other branch of the controversy; and his case may have been thought sufficiently hard without that addition to it. But, to leave no doubt as to the intention of the Court to make the decree final as to him, they enter a special continuance *as to the other parties alone*. Suppose this had not been done; a question might have arisen under the Act of Assembly, (Edit. of 1794, 1803 and 1814, p. 84,) whether, as the cause was called, and a decree final in its nature made as to one defendant, and no ulterior proceedings directed as to the others, there was not a discontinuance of the cause:—if so, all parties would have been out of Court, and consequently, under the *special* continuance in this case, *Alexander* would have been thrown out. But, if this continuance was not necessary to keep the case in Court as to *them*, it could only have been resorted to as a means to shew that the decree as to *him* was final, and that the cause, for the future, remained in Court as to the other parties *alone*: and this part of the decree is en-

tered by their consent, shewing their willingness to consider the case as thereafter depending between themselves only, and that no other or further decree was wished against him.

MARCH,  
1819.  
Alexander's  
heirs  
v.  
Coleman and  
Wife.

Suppose *Alexander* had not appealed, could they, on the final decree *between themselves*, have had an alteration in regard to him, so as to compel him to convey, or to account for rents? Had they gone on finally to a bare decree of partition, after his death, would such decree have been erroneous because the cause had not been revived against his heirs, when, in fact, it never had been abated as to him; his name being off the docket at the time of his death? Or how could his heirs, or he, had he lived, have appealed from a decree in which the other parties *alone* were named, and the cause *heard only between them*?

But, again; suppose, after this decree, the parties had wished to strengthen their case as to *Alexander*; could they have taken Commissioners to examine witnesses; or could he have done so, when his name was no longer on the docket?

As to viewing this case with analogy to the cases of writs of error from the King's Bench to the Common Pleas, I think an examination of the cases will shew that the writ will lie as well where a part of the demand against the same party, although not the whole demand, is adjudged, as where the demand against one party is adjudged while the original is pending as to the others; and consequently such view supports my position.

*Metcalf's case*, 11 Co. Rep., was a writ of error to a judgment, *quod computet*, in an action of account. This judgment was not *to the damage of the party*:—it was no more than what a writ of Enquiry would be in an action of trespass or assumpsit; nothing is recovered against the party until the account is taken, when the judgment is given for what is found due:—it was therefore not such judgment, *ad grave damnum* of the party, as the writ of error means. And, though general principles are laid down in that case, yet the same case



MARSH,  
1819.

Alexander's  
heirs  
v.  
Coleman and  
Wife.

shews there are exceptions to those principles: as where the Judgment, though it does not settle every thing, is nevertheless final as to part, or where, though pending as to some of the parties, it is nevertheless final as to others.

A reference to a number of such cases will be also found in *Bac. Abr.* Title ERROR, Letter A.

It will there be found that, in case of a judgment in *Ejectione Firmæ* by default or on demurrer, a writ of error will lie before a writ of enquiry of damages executed; for the judgment *quod recuperet possessionem* is perfect, and the plaintiff may have execution; and if the defendant were hindered of his writ of error, it might be in the plaintiff's power, by refusing to bring or execute his writ of enquiry, to delay the defendant forever.—So also of a like judgment in debt, where the plaintiff takes a writ of enquiry.

If my opinion in this case, should be considered as in hostility to any former decision of this Court, it is not so understood by me.—I think this case would go farther than any other decision here, and farther than I would be justified by the law in going.—Until this Court shall be desirous to reconsider any former opinion given, I shall always consider myself bound by solemnly adjudged cases; but surely I must be correct in saying, that if this decree *puts this party out of Court*, so that he could neither take depositions, nor move for a re-hearing in the cause, it goes beyond any case heretofore adjudged.—I think when this Court have decided that, where a suit is brought to subject property to be sold under an alleged mortgage or incumbrance, or to sell lands in the hands of devisees, &c., and where there shall be decrees for such sales, in all which cases a man's property may be sold contrary to the plainest principles of Equity, as appears would have happened in the case of *Mackey v. Bell*, 2 *Munf.* 523, it has gone as far as either the letter or sound policy of the law will justify.—In such case, the decree is not final; because (as I understand the decisions,) the party is still in Court, and the Court may alter its decree after the report of the sale, and the payment of the money, is made.—What effect such alteration, in that

March,  
1819.

Alexander's  
heirs,  
v.  
Coleman and  
Wife.

stage of the case, would have upon the party whose property has been sold, or upon the purchaser whose money may have gone into the hands of an insolvent person, is a question so important as to require, perhaps, at least, great caution in the Courts below in preserving to themselves, and to this Court, in case they err, the power to do final justice to the parties;—or otherwise persons might be deterred from bidding at such sales.—Should it, however, be hereafter decided that such a sale vests an indefeasible title in the purchaser, (concerning which I mean to intimate no opinion,) altho' the Court in it's final decree may say that it's first decree was altogether erroneous and improper, then the question may arise how far such decree was not, in *reality*, final and appealable from, being without the reach of the Court on the final hearing, and beyond it's power to rectify it.—What effect too the opinion of this Court, that such decree is interlocutory, because it can be altered at the last moment that the cause and the parties affected thereby remain in Court, will have in the decision of the question as to the purchaser's title under such decree, is one which may also be worthy of enquiry whenever that case comes before us.

According to the now settled law of the Court, however, such decrees I admit to be interlocutory, because, as I understand, the party remaining in Court can procure that Court to rectify it's own errors; but where he is not in Court, and so can not procure a re-hearing and alteration of the decree, which I think is the effect of the decree in this case, the reason of the decisions, and consequently the decisions themselves, do not preclude the appeal which has been taken.

Judge CABELL. The question now to be decided is whether the dismissal of the appeal by the Chancellor was correct: and it being admitted that this question depends upon the character of the Decree from which the appeal was taken, we are brought at once to the enquiry whether that decree be final or interlocutory.

I have examined with great attention every case in this Court, on the subject of Interlocutory Decrees, from

March,  
1819.

Alexander's  
heirs  
v.  
Coleman and  
Wife.

*Foung v. Skipwith* (2 Wash. 300) to the present time. They are so well recollected that I deem it unnecessary to enumerate them, or to detail their circumstances. They were all, without exception, decided on the same general principle; that every Decree which *leaves any thing to be done in the cause, by the Court*, is interlocutory, as *between the parties remaining in Court*. But is the decree interlocutory as to those persons also, who, although parties to the decree, remain no longer parties to the cause in Court? I do not understand this Court to have given such extension to the principle: for every instance in which it has been applied at all, presents the case of the parties remaining in Court. And the reason assigned why those decrees were interlocutory and not final, viz., that the Court below, might itself have corrected them, shows that the principle is restricted to those cases where the parties are retained in Court: for upon what principle of judicial proceeding can any Court change or alter decrees for or against persons who are no longer parties before it?

But while no case can be found in which it has been held, that a Decree is interlocutory as to any person no longer remaining in Court a party to the cause, there are cases in which this Court has sustained appeals from Decrees dismissing the Bill of the complainants as to some of the defendants, but leaving the cause still in Court as to the complainants and the other defendants: *Ball's Devises v. Ball's Ex'or. and widow*, (8 Mich. 279) is a case of this description. The Chancery Court dismissed the Bill as to Mrs. Ball, the widow, but retained the cause in Court as to the complainants, and the other defendants. *Gainey v. Fulcher*, is another case of the same sort; the Chancery Court having dismissed the Bill as to Fulcher, one of the defendants, leaving the case undecided as to the others. In both these cases, appeals were taken to, and sustained by this Court; which would not have been done, but on the principle that the Decrees were final. If the complainants in these cases, whose rights as to some of the defend-

and were thus decided on by the inferior Court, but who nevertheless still remained in that Court, for the purpose of settling the controversy with the other defendants, were allowed to appeal before that other controversy was settled, it would be difficult to assign a reason why one of two defendants, whose rights are finally acted upon by a decree which, (leaving him neither interest nor liberty of action in Court.) puts him out of Court altogether, should not also be permitted to appeal.

MAHE,  
1819.  
Alexander's  
heirs  
v.  
Coleman and  
Wife.

I do not think it necessary to refer to the English decisions on this subject, because I readily admit that a greater latitude has been allowed in England than in this country; and because I consider the right of appeal from a decree like the present, to be established by the decisions of this Court.

But putting all the decisions out of view, and considering the question as an original one, I could not put upon the Act of Assembly defining the Jurisdiction of this Court, any other construction than that given to it in *Ball's Devises v. Ball's Ex'or. and widow*, and in *Guins v. Falcher*. This Court is to have jurisdiction (3 A. Code, p. 60) in all cases brought before it, "by appeals, writs of error, or supersedeas, to reverse decrees of the High Court of Chancery, or Judgments of the General Court, or District Courts of this Commonwealth, after those decisions shall be final there." The object of the law is to give relief, by way of appeal, to persons aggrieved by the erroneous decisions of inferior Courts; but this relief is postponed till "those decisions shall be final there." What is the decision that is thus required to be final? The decision of the cause as to the party aggrieved, and not its anterior decision as to other parties litigating other controversies. It is true that this decision must be final; but the decision of a Court, is, emphatically, final there, when that Court can no longer change or alter it: and such I conceive to be the law in relation to a decree which decides the controversy as to one of the parties and puts him out of Court.

In the case now before the Court, *Alexander's* rights were finally acted upon, and taken from him, by the de-

*Mason,*  
1819.  
~~~~~  
Alexander's
heirs
v.
Soleman and
Wife.

deed in question: for the deeds under which he claims title were declared void, and the title of his adversaries, (who were all complainants as to him) was confirmed. It is no objection to the character of this decree as final, that it does not give costs; for costs are given or not given, at the discretion of the Chancellor. Nor is it any objection to the decree in this respect, that *Alexander* was not directed to convey or release his title to his adversaries; for a decree is not the less final, for omitting to give all that the complainants ask, or all that the Court ought to give. That would only prove the decree to be *erroneous*. It is *final* when the Court gives all that it intends to give, as to one of the parties, and puts him out of Court; and by putting him out of Court, takes from itself the power to change or revoke it. Such was the case in the present instance. *Alexander's* title was derived by successive deeds from *William Elliott*, from whom also the other parties in the cause derived their claim to the lands in controversy. The County Court thought that nothing farther was necessary than to set aside *Alexander's* deeds, and establish the validity of the deed under which the others claimed; thus extinguishing, as they thought, *Alexander's* title, and setting up and confirming that of his adversaries. Whether this was all that they ought to have done, is another question, and unimportant now to be decided. It is sufficient that it was all they intended ever to do in relation to *Alexander*. That such was their intention, is manifest from the order immediately following the decree, which continued the cause in Court as to the other parties only. I say as to the other parties only: for it is expressly continued as to *them*, and is not continued as to *him*. I know not how a Court of Chancery could more clearly shew its determination to turn a defendant out of Court. This order of continuance, although the act of the Court, was also the act of the parties concerned in it; for it was entered up by their consent. Their consent that the cause should, thereafter, be retained in Court, as a cause between *them* only, and in which *Alexander* had no longer any interest or agency, shews also that, although

they had demanded in the Bill, more of *Alexander* than was given by the decree, yet they were satisfied with what the decree had given them. I consider, then, the Decree, as to *Alexander*, completely final.

Mason,
1819.
Alexander's
heirs
v.
Coleman and
Wife.

I readily admit that, if it be clear that the law does not give jurisdiction to this Court, nor arguments derived from considerations of expediency, would induce the Court to assume it. But if the law be doubtful, such arguments may, with propriety, be resorted to for the purpose of aiding in it's construction. *Alexander's* rights being taken from him, and he turned out of Court, is it just that he shall be restrained from applying for redress, until other persons shall settle other controversies in which he has no interest; and that too, in a suit, the termination of which, he, of course, can not expedite, but which they may indefinitely postpone? It is worthy of remark also, that this suit was for partition between the other parties, of a tract of land, an undivided moiety of which was claimed by *Alexander*, on an adversary title. It was essential to the purpose of a just and advantageous division, even as to the other parties, that his claim should be previously put to rest forever, or finally established; for the fund should be ascertained before it is divided.

I am, therefore, of opinion that the Decree of the Chancellor dismissing the appeal, is erroneous.

Judge BROOKE. In the decision of this case, I have not thought it necessary to review all the cases that have been decided in this Court, for the purpose of ascertaining how far it has gone, and at what point it has fixed the limit between interlocutory and final decrees. The case now before the Court is certainly not of the character of any of the cases in which decrees supposed to be interlocutory have been adjudged to be final. It differs from the cases of *Ball's devisees v. Ball's executors and widow*, 3 Munf. 279, and *Gaines v. Fulcher*, in which it might have been questioned whether the decrees were interlocutory or final. In neither of these cases was the point made: in the first case, the decision was that the Chancellor erred in dismissing the Bill as to one of the de-

Mason,
1819.

Alexander's
heirs
v.
Solomon and
Wife.

defendants who was a necessary party in the final decree: the error to be corrected could not have been corrected by dismissing the appeal only. In the case now under consideration, the decree is that sundry deeds, so far as they are intended to convey any title to the lands in the bill mentioned, be set aside, and that the title in the plaintiffs be quieted. Thus far, it was not final as to *Alexander*: he had not been decreed to convey his legal title to the land in question, according to the respective interests of the parties, as was prayed by the Bill; nor could such decree have been pronounced until the quantum of each had been ascertained. There is nothing in it that puts the appellant out of Court. The continuance of the cause as to the other parties, by consent, was ineffectual, and can not be considered as the act of the County Court. If that were material, no costs were decreed against him, which would have followed a final decree, unless, for reasons which ought to have been stated in the decree, he was not to pay costs. From this decree *Alexander* appealed, and the Court erred in permitting him to take that course: but that error will not convert a decree, which before was only interlocutory, into a final decree. On these grounds, I am of opinion the decree of the Chancellor ought to be affirmed.

Judge ROANE. This is a bill brought by the appellees in the County Court of Loudoun, against *Johnston & George Cleveland*, and against *Hough* and the appellant *Alexander*. In that suit the said *Cleavelands* were the principal defendants, and the principal object of the suit had relation to them. They were the principal defendants, and the suit relates principally to them, because, in fact, they are the defendants first named in the several subpoenas instituting the suit; because it claims from them an equal third part of their common father's whole estate, whereas it only demands from *Alexander* a part thereof; and because they demand nothing against *Alexander*, without first establishing their right, and the extent thereof, against them, the *Cleavelands*. The claim against the former is merely incidental to, and depends upon, the appellee's success against, the latter. Every

argument, therefore, which inhibits *one* of several defendants from evoking his cause into the appellate Court, before a final decision thereof, holds *a fortiori* in relation to a case of this character; a case in which the party claiming to appeal has only a *partial* interest in the subject of controversy, and against whom no decree can be justly rendered, but in the event of getting a decree against another and more principal defendant.

MARCH,
1819.
Alexander's
heirs
v.
Coleman and
Wife.

The claim of the appellees, as against the *Cleavelands*, more particularly, is, that they be let into the enjoyment of one third part of their father's estate, and be put in possession thereof; and they pray the Court to decree to them this right and this possession. Their claim against *Alexander* and *Hough* is, that the Deeds, by which they hold a preferable *legal* title to a tract of land *part* of such estate, be cancelled, and *Alexander* decreed to convey the said land to the appellees and the said *Cleavelands*, *according to their respective interest therein*. As to the propriety of these prayers, or either of them, it is not necessary to say any thing. It is sufficient that the claims are made. Being made, they ought to be decided on by the Court. At the same time, it would not be difficult to shew, that, as the appellees have an indubitable right to get the decision of the Court as to the validity and extent of their right, it is equally proper that, when their part is ascertained, they should not only receive a *Deed* for the land in question, but for that specific part thereof, by metes and bounds, to which they may be found entitled. The whole matter ought to be ended in this suit. The appellees ought not to be driven to another suit, or to a separate proceeding in this suit, to recover from the *Cleavelands* a *Deed* for their proper portion of the land in controversy.

With respect to the claim against the *Cleavelands*, (the *substratum* of the decree before us,) there has been no decree whatever upon it. The case, as to it and them, is still depending in the County Court; and this case exhibits the singular spectacle of the *principal* subject abiding in the Court below a decision upon an *incidental* one in the appellate Court. It has not yet been decided

MARCH,
1819.

Alexander's
heirs
v.
Coleman and
Wife.

that the appellees have *any* title to the estate in controversy, nor what their due proportion is. If it should be found, hereafter, in the County Court, that the appellees have *no* claim whatever to any part of old *Cleveland's* estate, in consequence of a later Will made by him, a release, or the like, the question now discussed before us would become an abstract one; one in which no recovery could be had. If the case, however, is to be separated; if two causes are to be carved out of what is intrinsically *one*; an opposite course of proceeding should have been adopted. The branch of the case now before us, should have waited in the County Court, until it had been decided, in the other branch, in the appellate Court, whether the appellees were entitled to any part, and to what part, of the said estate. In that case, it would have been practicable, (which *now* it is not,) to decree in what proportions *Alexander* is to convey the land to the several claimants, and particularly the appellees; which is an essential prayer of their bill.

The decree before us is not final even as to *Alexander*. It is not final, whatever may be it's terms, not only because it necessarily depends on the decree which is to be rendered against the *Cleavelands*, and must be conformed thereto when it is made, but because it omits to decree a *Deed to be made* to the appellees, and *that* for the specific proportion of the land they may prove to be entitled to. This last is the prayer of the appellees' bill as it relates to *Alexander*; and a Decree which neither grants nor rejects a proper and necessary prayer of a plaintiff's bill, but passes it by, can not be deemed final. That deed ought to have been decreed to be made: without it, the appellees have no legal title to the land in question, and could not maintain an Ejectment for it. It was proper to be asked by them, and they ought to receive it at the hands of the Court, if their title to the land is established: it is not enough to declare the appellant's deed to be void. A Decree omitting to respond to a most important prayer of a Bill, will not, in a doubtful case, be taken to be final. A Decree which entirely omits to act upon the main object of the suit, and to decree against

the *principal* and necessary defendants, and which stops short of deciding upon what is properly asked as to the others, can not be final. So it can not be final when it may be, in effect, reversed by another decision given by the same Court in another branch of the same cause. It is in it's nature interlocutory, and would be so considered even if the Court rendering it had declared it to be *final*.

MARCH,
1819.
Alexander's
heirs
v.
Coleman and
Wife.

In this decree, however, no such *declaration* is contained. No costs are given against the appellants, which is the general criterion of a final decree.—The appellants are not dismissed from Court, otherwise than by implication;—by the implication which arises from *continuing* the cause, by consent of parties, as to the *other* defendants. Without that consent, it is presumed the decree would not have assumed its present shape, nor the present pretension have been made:—but that consent, it was solemnly decided by this Court, in the case of *M'Call v. Peachy*, can not make a decree final which in itself is not so;—can not give to the appellate Court cognizance of a case before a final decision is made in the Court below.—Unless you consider this Decree interlocutory, the defendant will get clear of the costs, when the title is found against him. He will be held to quiet the title of the appellees to land in which it may be hereafter decided they have no interest.

In deciding against the right of appeal in this case, in which all the defendants are *necessary* defendants, and all the parts of the cause constitute *one* cause, I decide nothing as to cases in which the proceeding in the Court of Equity may be abused;—in which, for example, several distinct suits may be formed into *one suit*, and the demand against *one defendant* has no necessary connection with that against another.—In that case it might be argued, at least, in favor of a defendant, (but on this point I give no opinion,) that the suit is, in effect, a distinct suit.—It might be said to be hard to keep one man in Court against his will, merely because of the existence, in effect, of a separate and distinct suit against another. It would be no how necessary to a *complete* decree in

MARCH,
1819.

Alexander's
heirs

v.
Coleman and
Wife.

either case, that the cause of one defendant should await on that of another. It may be, that a party ought not to be restrained, in his right of appeal, because a plaintiff has arbitrarily chosen to consider that cause as *joint*, which is in it's nature *several*.

In denying the right of appeal in the case before us, it is true the appellant is *postponed* in his admission into the appellate Court: but he is postponed no longer than until the cause, in all it's parts, has been decided in the Court below. He finds his equivalent for that delay, in this;—that the whole matter is to be now settled, and he exempted from other suits. He also finds an equivalent in the acknowledged right of the Court below to correct it's own errors, up to the time of dismissing the cause from the Court in all it's parts. That Court, by it's more mature deliberation, may render the appeal, now before us, wholly unnecessary.

I ought to apologize for discussing, in any degree, on the merits, a question which has been solemnly settled in this Court. It was unanimously settled twenty-two years ago, on great consideration, the very able bar of that day giving to the Court the aid of it's opinions and deliberations. The decision was made in the case of *McCall v. Peachy*. It was then decided that there can be no appeal from an interlocutory decree, even by consent of parties. All the arguments now urged for the appellant, were then used and overruled. Inconveniences were admitted to exist, but they were referred to the Legislature:—and the Legislature has since acted upon them. That decision has been acquiesced in until lately; conformed to by succeeding Judges; and frequent recognitions of it's principles have taken place in this Court. I wish to refer particularly to that decision and to the others, and will subjoin a few additional observations upon the subject.

With respect to the decisions in the cases of *Ball v. Ball*, and *Gaines v. Fulcher*, I know but little.—I did not sit in either case. They were not, however, discussed, if considered, on the point of jurisdiction.—As to that point, they may be considered *sub silentio*, as they are

single decisions. I do not stop to enquire whether they conflict with the former decisions in this particular: but, if they do, they are not entitled to outweigh the solemn resolutions of the Court in the case of *McCall v. Peachy*, and the succeeding cases.

MARSH,
1819.
Alexander's
heirs
v.
Coleman and
Wife.

The decision in the case of *McCall v. Peachy* was bot-
tomed as well upon general principles of construction
found in the English decisions, as upon the imperious
words of our Statutes.—As for the general principles of
construction, they are best exhibited in *Metcalf's* case,
11 Co. 38 a.—One of those principles is, that a Writ of
Error only lies upon a *final* judgment, in account or par-
tition for example. The terms in a Writ of Error,
“*judicium inde redditum*,” were expounded to mean the
principal and *final* judgment. They were so expounded
(*inter alia*,) because, when we speak of a thing or per-
son, the *principal* or most worthy is to be intended.—It
was also adjudged, that the words “*judicium redditum*,”
as aforesaid, are to be intended, not only “*de principali
judicio*,” but also “*de integro judicio*.”—They can not be
satisfied by a *partial*, and much less by an *interlocutory*
judgment.—As the Writ of Error rehearses *ALL those
who are parties to the original writ*, and then says, “*si
judicium INDE redditum*,” &c., it proves that it does not
lie before it is decided as to *all* the parties, and the whole
matter is determined.

Another reason assigned for this, is that the *whole re-
cord* is supposed to be either in the Court below or the ap-
pellate Court, and that the original is entire and can not
be in both Courts at the same time.—It was accordingly
resolved in that case that, as the judgment intended is that
which goes to the *whole demand*, so the record shall not be
removed till the whole matter is determined. It is stated
more particularly, that, in the case of several defendants,
if the original is *one*, and the declaration *one*, one of the
defendants can not have a Writ of Error 'till the *whole*
is determined; for that, as aforesaid, the record can not
be in the King's Bench and Common Pleas at the same
time. It was also resolved that the record is not remov-

MARCH,
1819.

Alexander's
heirs
v.
Coleman and
Wife.

ed until *final* judgment, for the farther reason that, until then, the Chief Justice of the Common Pleas has no authority to send it; the words of the writ being, "*si judicium inde redditum sit, tunc recordum, &c. mittatis, &c.*" It is not to be sent until ("*TUNC*") the judgment; that is, the principal and final judgment, the judgment ("*de INTEGRO*,") upon the whole matter, and as to all the parties, shall be rendered.

These principles in all their parts apply emphatically against allowing the appeal in the case before us. I will merely stop to repeat that the judgment heretofore rendered and now before us, is not the *principal*, but an *incidental* judgment:—the principal judgment will be that deciding whether the appellees have a right or not to the estate in question. So it follows that the judgment before us is not the *entire* judgment:—the judgment forming the *substratum* of the appellee's claim against *Alexander* has not yet been rendered, and is now wanting; and, when pronounced, it may render the present appeal wholly unnecessary. The principles in *Metcalf's* case are sound, and conclude the question before us. It is not denied that there are some *exceptions* in the English books from these principles:—some such may be found in *Bacon* and other abridgments. But, while it is not admitted that the case before us would form an exception even in England. it is strongly influenced by the imperious provisions of our Statutes.

The force of the above principles was held, in the case of *McCall v. Peachy*, to be entirely corroborated by the strong phraseology of all our Acts in relation to the right of appealing. The words of those Acts go, in general, to allow appeals "after those *decisions* shall be *final*" in the Court below. The term *decisions* must be taken as co-extensive with the actual questions in controversy. It can not be satisfied by a decree embracing only a part or portion of the subject. So the term *final* means that decree which makes an *end* of the case in the Court below, and is used in emphatical contrast to such decrees or orders as are only progressive to that end; as are merely interlocutory.

As to the extent of the right of appealing, it is a matter of mere positive institution. The party takes it to the extent, and on the terms on which it is granted. There is no great principle which calls for the correction of the appellate tribunal upon the immature and inchoate acts of the inferior Court. These, that Court may, itself, correct, on future deliberation. It is only their ultimate and solemn decisions which are the proper subjects of appeal.

MARCH,
1819.
Alexander's
heirs
v
Coleman and
Wife.

In my judgment, the criterion of the right of appeal is, as aforesaid, whether the cause has been *finally* decided upon in all it's parts in the Court below. This, as aforesaid, has been long the established criterion in this Court. Another criterion, however, has been lately set up: and that is to allow that right to any party who is *de facto* discharged from the Court below, although it may clearly appear to the appellate Court that he was erroneously so discharged. and that no complete decree can be made in the cause without him. What is this but to allow the Court below to multiply appeals at it's pleasure, transfer to the appellate Court it's inchoate and immature judgments, set up an arbitrary standard of appealing, and repeal so much of our laws as restrict appeals to decrees which are final. A provision of an Act is no provision which can be thus set at nought, at the mere will and pleasure, or by the errors, of a subordinate Court.

In support of this alledged criterion, the loose words of Judges have been clutched at, who say the appeal does *not* lie, because "all the parties are retained in Court, &c." The error of Gentlemen consists in adopting the *converse* of that proposition. They infer from that *dictum*, that if, on the contrary, a party is *discharged* from Court in the most *incipient* stage of the proceeding, the right of appeal accrues. It is entirely a *non sequitur*.—This idea is in utter collision with every principle on the subject, and with the provisions of our Acts, which give appeals, and give them only in cases where the decisions have been *final*. They do not admit, however, that the criterion of such *finality* is, that a party has been dis-

MARCH,
1819.

Alexander's
heirs
v.
Coleman and
Wife.

charged prematurely, and erroneously discharged, from the Court below.

Admitting, however, the correctness of this newly discovered criterion, it does not sustain the claim of the present appellant. He has *not* been in fact *discharged* by the decree of the Court below. There is nothing in that decree which shews it, otherwise than by a remote and fallible implication.

For these reasons, I entirely concur in opinion with Judge BROOKE that the appeal was prematurely allowed to the Chancery Court; and that the Decree of that Court dismissing the same for that cause, is correct and ought to be affirmed. And the said Decree is to be affirmed accordingly.

Decided,
April, 2d,
1819.

Hudsons against Hudson's Administrator and others.

1. If a widow holding, by virtue of her husband's Will, certain slaves for life, with power to dispose of them afterwards, *among his children*, as she should think proper, bequeath them to *trustees* for the benefit of *one only* of those children; such child must be considered as holding the slaves under her Will, *adversely*, in relation to the other children, and therefore may be protected by the act of Limitations from a claim in their behalf.

2. In a case where it is necessary to plead the act of Limitations, it ought, in order to form a bar, to be *specially* pleaded, or at least insisted on; that is, the term prescribed by the Statute should be *particularly* (if not *formally*) pleaded, or relied on, to let in the plaintiff to shew, in his replication, that, within that term, an original had been sued out, if the fact were so, and thus to avoid the bar.

3. Where a testator empowers *his widow* to dispose of certain slaves "*among his children*," (in general terms,) "*as she shall think proper*," she can not give them *all to one, nor wholly exclude any*; nor can she give any of them to his *grand children*: and if she make an appointment violating this principle, it will be avoided in Equity, and the property distributed among all the children and their representatives.

4. The circumstance that slaves are bequeathed to *trustees*, for the use of a person, that he may enjoy the profits of their labour during his life, &c, is not, in itself, sufficient evidence that, *by virtue of such bequest*, he had *actual possession* thereof, *adversely* to the claim of other persons.

5. A possession of slaves commencing *during the infancy* of a plaintiff, can not operate a title in favour of a defendant, until it has continued five years after such infancy has ceased.

6. When the act of Limitations once begins to run, it runs over all *mere* acts, such as coverture, infancy, &c. (See *Fitzhugh v. Anderson*, 2 H. & M. 289.)

ted to record the 26thth of February 1789, bequeathed to his wife *Elizabeth Hudson* certain slaves during her life, and directed that the same should be by her disposed of, among his children, after her death, as she should think proper. The Will contained sundry devises and bequests of lands, slaves and other property, in various proportions, among to his four sons, *Lewellin Hudson; William Chamberlayne Hudson, Charles Hudson* and *Francis Eppes Hudson*; his daughters *Elizabeth Littlepage Price*, and *Mary Bass*; and his Wife.

APRIL,
1819.
Hudsons
v.
Hudson's
administra-
tor and
others.

Elizabeth Hudson, the widow, by her Will dated the 28th of October 1794, and admitted to record in December following, gave nearly all the slaves, in which she had a life estate as aforesaid, together with their future increase, to *William B. Giles* and *John Royall*, or the survivor of them, in trust for the use of her son *Francis Eppes Hudson*; that they should permit him during his natural life to enjoy the profits of the said slaves; and, after his death, that the said slaves with all their increase should be equally divided among his children lawfully begotten; or, if he should have no children, among the surviving children of her other sons and daughters above mentioned.

Francis Eppes Hudson qualified, in August 1795, as administrator with the Will annexed, in which the testatrix also directed that he should pay all her just debts, together with certain legacies to her daughter *Mary Bass* and her son *Charles*.

On the 20th day of June 1808, *Hannah Hudson* and others, children and representatives of *William Chamberlayne Hudson* (who died on or about the 29th of July, 1800,) sued out a subpoena from the Superior Court of Chancery for the Richmond District, against *Francis E. Hudson* administrator of *Elizabeth Hudson* deceased, *William B. Giles*, and *William Royall* executor of *John Royall* the other trustee. In March 1809, they filed their Bill; and afterwards an amended bill, making the other children of *Christopher Hudson* parties, to set aside the appointment made by the Will of *Elizabeth Hudson*,

April,
1819.
Hudson
v.
Hudson's
administra-
tor and oth-
ers.

in relation to the slaves, as unjust and partial, and not authorized by the proper construction of the Will of *Christopher Hudson*; that an equal division of the said slaves and their increase might be made among all the children of the said *Christopher* and their representatives; to compel the defendant *Francis E. Hudson* to account for and pay the value of one of the slaves, sold by him and converted to his use since the suit was brought; and to obtain an Injunction to restrain him, *pendente lite*, from removing any of them out of the State: which Injunction was granted by the Chancellor.

Francis E. Hudson by his answer insisted, for various reasons, that the appointment made in his favour was reasonable and just, under all the circumstances of the case; that it was the intention of the testator *Christopher Hudson*, expressed in his Will, that the power given his Wife should be exercised entirely according to her own discretion, provided she gave the slaves to any one or more of his children; that the amount of debts and legacies, which the respondent was to pay, under the Will of *Elizabeth Hudson*, was so large as to leave him, with the negroes bequeathed to him, but a small part of his father's estate; at any rate not more than his brother *William C. Hudson*, father of the plaintiffs, had received. He admitted that, since the institution of the suit, he sold for a fair price the negro boy mentioned in the Bill; but alledged that *Elizabeth Hudson* died intestate as to part of the negroes; viz., a woman named *Dolsha* and child; that, in consequence thereof, the said slaves were sold, and the money arising from such sale was equally divided between *William C. Hudson*, and others; concluding with remarking, "that the said *William C. Hudson* lived many years after the death of his mother, and never claimed the property now sued for by the complainants, because he was well satisfied that he had no right to make such a claim; and the respondent is advised that it is not competent for the plaintiffs at this time to claim the same in right of *William C. Hudson*."

The defendant *Lewellen Hudson* answered; saying, that he had received no part of the slaves in controversy, except an equal part of the money which *Dolsha* sold for. No answers being put in by the other defendants, decrees nisi were duly served upon them. A receipt from *William C. Hudson* for his share of the price of *Dolsha* and her child, was made an exhibit.

April,
1819.
Hudsons
v.
Hudson's
administrator and others.

Chancellor TAYLOR dismissed the Bills with costs; from which Decree the plaintiffs appealed.

The following was the opinion of this Court, which Judge ROANE delivered.

The Court is of opinion, that, as the will of *Christopher Hudson*, was consummated, in favour of the appellee *F. E. Hudson*, by that of *Eliza Hudson* his widow and trustee, (though improperly consummated,) the said *F. E. Hudson* is to be considered as holding the negroes thereby appointed, *adversely*, in relation to the appellants, as much so, as if the Will of the original testator had been perfected by himself; and that, *quoad* the appellants, the appellee *F. E. Hudson* is not so to be considered a trustee, as to bar him from relying on the act of limitations. There was no special trust or confidence reposed in him which should have that effect; and he stands merely in the common situation of a man who has obtained property to which he is not entitled. Denying to him, therefore, the benefit of the Act of Limitations, would go far to repeal the operation of that act altogether. The Court is also of opinion, that, although five years had not elapsed between the death of *William C. Hudson*, the father of the appellants, (some of whom are infants,) and the time when the appellee *F. E. Hudson* administered on the estate of his mother, and *probably* got possession of the negroes in controversy, that circumstance would not prevent the statute from affording a bar; the principle being that, when the act once begins to run, it runs over all means acts, such as coverture; infancy, &c., and that it would defeat the statute, if, after the lapse of four years, the death of the plaintiff and infancy of his issue were to set all at large again. (1 *Str.* 556, *Gray v. Mendez*.)

APRIL,
1819.

Hudsons
v.
Hudson's
administra-
tor and oth-
ers.

The Court is also of opinion, that the possession of *F. E. Hudson* in this case was in his character of *appointee* of his mother, and not in that of her *administrator*; for it was not *her* property, *nor could he receive it as such*. But the opinion of the Court is that, where it is necessary to plead the act of Limitations, it ought, in order to form a bar, to be *specially* pleaded, or at least insisted on.—A general averment, such as that in the answer of *F. E. Hudson*, that *William C. Hudson* lived *many years* after the death of his mother, and did not claim the property, is not sufficient. It does not assert, or necessarily import this delay to have been for *five* years; and the expression may be as well satisfied by four years and eleven months as by *five* years. It is important that the term prescribed by the Statute should be *particularly* (tho' not *formally*) pleaded, or relied on, to let in the plaintiff to shew, in his replication, that, within that term, an original had been sued out, if the fact were so, (4 *Bac.* 484,) and thus to avoid the bar: but such replication might be deemed immaterial, if not impertinent, in a case in which the delay to sue for the full term prescribed by the statute had not been put in issue by the defendant. Altho' the statute might have been pleaded in this case, therefore, the opinion of the Court is, that it has not been so pleaded or relied on; and we are driven to decide the cause upon it's merits.

On those merits, the Court holds the principle to be, that, where a power is given to a trustee to distribute an interest among *all the children*, he cannot give it *all to one*, *nor wholly exclude any*, nor can he appoint any part of the subject to the *grandchildren*, of the testator. An appointment violating this principle, (as the present does in all it's members,) will be avoided in Equity; and the property distributed among the children and their representatives. All these points were decided by this Court in the case of *Owen v. Morris* (2 *Call* 520.) If there was nothing else in this case, therefore, the Court would give it this destination, as to the negroes and their *profits*; debiting the appellee, at the same time, with the full value of one of the negroes, admitted to have been

APRIL,
1819.Hudsons
v.
Hudson's
administra-
tor and oth-
ers.

sold by him, and converted to his own use. It is, however, *probable*, that, altho' the appellee has no other title to the slaves in controversy, such title may have accrued in his favour by an actual *adverse possession* of them for more than five years. That such possession will give a title to a defendant, (as well as a plaintiff,) and *that without pleading the Act of Limitations*, has been often decided in this Court. We refer particularly to the cases of *Jordan v. Murray* 3 Call 85, and *Garth's executor v. Barksdale*, 5 Munf. 101. Altho' it is *probable*, from this record, that this possession did actually exist in the appellee in the case before us; and that a jury might deem itself justified to infer it, from the facts admitted and proved in the case, and *other testimony* which might be offered on the trial of an issue; there is not enough conceded, on *this* record, to enable the Court to infer that fact, *with certainty*. The Court must therefore avail itself of an issue to ascertain that fact; and, more particularly, to find whether or not an actual possession of the negroes in question commenced with the appellee *during the life time of Wm. C. Hudson*, and continued five years or longer. We would restrict the *commencement* of such possession *to the life time of the appellee's ancestor*; for it is not supposed that a possession *commencing* during the *infancy* of a plaintiff, should operate a title, in favour of a defendant, until such possession had continued five years after his infancy had ceased.

The decree is to be reversed with Costs; the cause remanded, and an issue directed, for the purpose aforesaid; on the return of which, the decree is to be rendered for the appellants, or appellee, under the principles of this decree, according as the finding of the issue may be in favour of one or the other of the parties.

Decided.
April 7th,
1819.

Taylor against King.

1. In a court of common law, fraud may be given in evidence, to vacate a deed, on the plea of *non est factum*; if such fraud relate to the execution of the instrument; as, if it be misread to the party, or his signature be obtained to an instrument which he did not intend to sign; but fraud committed in a settlement of accounts which preceded, or in a statement of facts which induced, it's execution, can not be pleaded or given in evidence; the only remedy, in such cases, being in *Equity*.

IN Ejectment in the Superior Court of Montgomery County, by John M. Taylor against Joseph King, the Jury found a special verdict; that Andrew Lewis was seized of the land in the declaration mentioned, with the appurtenances, in fee; that, before the 1st of February 1809, he had by proper deed conveyed the whole to his son Charles G. Lewis, who was thereof seized, and, while in actual seisin, being indebted to Reuben and Randolph Ross in the sum of \$1,515 32 Cents, on the 3d day of February 1809, executed, jointly with his father, a Deed of Trust to Henry Edmundson, to secure the payment of the said sum of money to the said Reuben and Randolph Ross; which Deed, being duly recorded, was found in *hæc verba*:—that, on the 4th of June 1811, the said Reuben and Randolph Ross, for a valuable consideration, fairly and *bona fide* transferred their interest, in the said deed of trust and the money secured thereby, to John M. Taylor the lessor of the plaintiff, by a writing under seal, found also in *hæc verba*:—that, on the 14th day of December 1811, the sum of \$1273 14½ Cents, secured by the said Deed of Trust, being due on account of principal and interest, the said Trustee, having fixed on Montgomery Court house, as the place of sale, distant from

2. A defendant being party or privy to a deed, can not avoid it, in a court of common law, by *parol* evidence, on the ground of want of consideration; for he is estopped from averring such matter against a *specialty*.

3. The Trustee in a deed of trust takes a *legal*, though defeasible title; and a deed from him to a purchaser, conveys an *absolute title*, in a Court of common law; whether the conditions of the Trust Deed have been complied with, or not; but the rule is different in *Equity*.

4. A Court of *Equity* will not permit the original owner of the land, or his alienee, to be injured by a breach of trust on the part of the trustee; and, therefore, will set aside a sale and conveyance by him, if the requisitions of the deed of trust have not been complied with.

5. A purchaser from a person who has previously conveyed the estate to a trustee by deed duly recorded, is estopped at law, though not in *Equity*, from impugning, on the ground of fraud, a deed regularly executed by the trustee, to a purchaser from him.

April,
1819.Taylor
v.
King.

the premises about ten miles, and, at the request of the said Taylor, having duly advertised the time and place of sale according to the provisions of the Deed, proceeded to expose the Land and appurtenances according to the tenor and in the terms therein stipulated; and, after due outcry at the place designated, the same was struck off to the said John M. Taylor, (who was the only bidder,) for the said sum of \$1873 14½ Cents: that, before this sale, and before the date of the advertisement, the suit mentioned in the said deed, depending in the Court of Appeals, between Andrew Lewis appellant and the heirs of William S. Madison, had been finally determined in favour of Andrew Lewis, so as to secure the title, as in the said Deed is mentioned, to Charles G. Lewis: that Henry Edmundson the trustee, by a deed of bargain and sale, (found also in *hæc verba*,) conveyed the premises to the lessor of the plaintiff:—that Charles G. Lewis, after he had made the said deed of trust, did regularly sell the land and premises for a valuable consideration, to wit, \$15,000, to Joseph King the defendant, and put him in possession thereof:—that, on the day of sale of the premises under the deed of Trust, and before the land had been knocked off by the auctioneer, a certain Garnett Peyton attended, and had made a positive and satisfactory arrangement to purchase the land in partnership with him the Trustee; and, in consequence of that arrangement, the said Peyton had come to the resolution to bid as far as \$8000, if the land could not be got for less: that, afterwards, on the same day, and before the sale had taken place, the said John M. Taylor, understanding that arrangement and determination, then and there agreed with Peyton, that, if he bought the land, the said Peyton should have it at the price of \$8000: that, in consequence of this agreement, and the conduct of Taylor, Peyton did not bid at the sale: that, on the morning of the day of sale, one James Craig asked Taylor, if it would not be right for him to bid to the amount of the Deed of Trust; that Taylor then approved the said Craig's intention of bidding, but, in the evening, and before the land was struck off, came to him, and requested him not to bid; in

MARCH,
1819.

Taylor
v.
King.

consequence of which he did not bid; but, if Taylor had not made the request, he would have bid to the amount at which it was cried off to the said Taylor, and more rather than have lost the land: that Craig had not, at that time, by him, more than about \$1100, but believed himself able to procure more money: that, in consequence of this conduct of the said Taylor, he was without a competitor in the market, and did obtain the land as the only bidder, at a very inferior and inadequate price; the land in the general estimation being worth from \$8,000 to 10,000: that the said John M. Taylor, the creditor and lessor of the plaintiff, was guilty of a fraud at the sale of the land aforesaid, by which he obtained it, as purchaser, at less than one seventh part of it's real value, to the injury of the said Joseph King. The verdict concluded in the usual form.

The Superior Court, upon this special Verdict, entered judgment for the defendant; from which the lessor of the plaintiff appealed.

Wickham for the appellant.

By virtue of a deed of trust, the legal estate is in the Trustee, who therefore may bring Ejectment, even after the debtor has paid the money without taking a release; for the estate, without a release, does not revert. So a mortgagee may bring Ejectment, before forfeiture; and the only remedy of the mortgagor is in equity.—*As law*, the person giving the deed, retains no estate, either in fee, or freehold, or for years.

The Deed therefore from the Trustee to the purchaser passed the estate; being good *between them*.—The Trustee can not recover from the purchaser, or defend himself from a suit for the land, founded on his own act.—Admit it not binding as to the debtor:—this can be in relation to *his right only*, which is *merely equitable*.—Can a fraud committed by others, turn it into a legal right?

Suppose the fraud had been between the Trustee and a purchaser, without the creditor;—would the deed be void *absolutely*, or only *pro tanto*?—Suppose the creditor a party to the fraud; what becomes of the estate?—Does it remain in the Trustee, notwithstanding his own deed?

Can the debtor bring *Rescission*, where the land has been sold, and possession delivered, by the Trustee to the purchaser? why should he? for the purchaser with notice of the trust, and of it's not being duly executed, is himself a trustee. (a) The proper remedy of King is by Bill in Equity to redeem or to set aside the sale; making the purchaser a party, who, then, must prove the sale regular, or the decree will be against him.—So, if A. sells to B., but makes no conveyance to him, and afterwards conveys to C.; (a purchaser with notice of B.'s right;) the conveyance is good at law;—the fraud of A. & C. does not give B. a legal estate:—his only remedy is in Equity.

It may be contended that a Court of common law has jurisdiction in cases of fraud.—I answer, that the Deed of Trust, which passed the legal estate, was not founded in fraud: but, if it were, the Court of law can not take cognizance of it, for the estoppel operates.—The case of *Chew ex'or. of Worsley v. Moffett*, lately decided, (ante) turned on the circumstance that, by joining issue, the objection to the legality of the plea was waived:—otherwise, the decision would have been different.

The rule laid down in the Books, is, that all contracts of a nature generally repugnant to the policy, or contrary to the provisions, of the common law, are void.—But the rule relates to contracts whose general nature and object is illegal; such as bonds for compounding prosecutions for perjury; (b) for the wages of prostitution, &c. (c) A similar rule applies to contracts prohibited by Statute. For example, a conveyance of all the goods of a trader, is an act of bankruptcy and void: (d) so also, bonds tainted with Usury, &c., are void.

In like manner, a Bond may be avoided on the ground of fraud committed in it's execution; as, if an illiterate person be induced to sign it, by reading it to him in words different from those in which it is written; (e) for, in such case, the mind of the obligor does not assent to the act.

The consequences of extending the rule farther, would be very inconvenient. Suppose the creditor, on a settlement, brings in a false charge of 5l. 0. 0 in 1000l., and

Assess
1819.

Taylor
v.
King

(a) *Ford*,
Book 2, ch.
6. § 2. note
(i.)

(b) *Col-*
ins v. Blan-
tern, 2 *Wils.*
341.)

(c) *Walk-*
er v. Per-
kins, 3 *Burr.*
1568.)

(d) *Wares-*
ley v. De
Mattoe, 1
Burr., 467.)

(e) 3 *Bac.*
293.)

April,
1819.

Taylor
v.
Hing.

takes a bond, for too much, to that amount:—if the debtor could plead the fraud at law, the bond would be avoided altogether; whereas the rule in *Equity* is, that the fraudulent instrument is void only so far as it ought to be so:

Again, if a person defrauded, executed a deed, would it be proper to permit him to avoid it in the hands of a purchaser without notice? If so, what becomes of title?

There is not a case like this, in which the conveyance has been decided to be void at common law:—but there are thousands in equity. Questions relating to purchasers without notice, breaches of trust, &c., form a main pillar of equitable jurisdiction, which would be thrown down, if the judgment now in question should stand.

Call for the appellee.

1. The deed from the trustee was void between the parties, for every fraudulent act is void in law; and a Court of law is competent to declare it so. (f) Neither is there any difference between a deed and simple contract; for what is base in it's origin can not be made good by form. (g) If you put the question upon the foundation of the mind's not assenting, that reason is as much applicable to one species of fraud as another. If a man, intending to give a bond for twenty shillings, is imposed upon, and made to give one for twenty pounds, the bond is void, (says Mr. Wickham,) because his mind never assented: but the truth is, the ground of avoidance is the fraud committed by his adversary.

A defendant is not estopped from pleading a collateral matter, which makes a deed void, or voidable:—not by the old law; as in the cases of the deed obtained by fraud from an illiterate man (h), and where a man persuaded a woman to execute writings to another, as her trustee upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c. (i): nor by the present law; for the party may shew that the deed was founded upon an illegal consideration; (k) or was obtained from a drunken man; or

(f) *Formor's case*, 5 Co 78; *Bright v. Egnon*, 1 Burr. 395-6; 6 *Viner* 475. C. pl. 3; *Cockshott v. Bennett*, 2 Term Rep. 765; 3 *Bac.* 297.)

(g) *Mitchell and Reynolds*, 10 Mod. 130; *Collins v. Blansarn*, 2 *Wils.* 348.)

(h) 11 Co. 27, *h. Shep Touch.* 70.)

(i) 32d. 431; 3 *Bac.* 295 note (a) (k) 2 *Wils.* 349.)

from a lunatic;(j) or by a fraudulent misrepresentation of the plaintiff's right to a patent for an useful invention.(m)

APPEL,
1819.

Taylor
v.
King.

The modern doctrine is that, even an equitable defence may be pleaded at law;(n) which abolishes the old doctrine of Estoppels, or shows that they only apply in support of justice; so that, in every case, the instrument being admitted, the bad consideration may be shewn.

(l) Bull.
N. P. 172,
7th Edit. ci-
ting *Cole v.*
Robin, per
Holt, *Salk.*
M. S. S.
Yates v. Be-
ech, *Str.*
1104; *Peake*
on Ev'ce,
265; *Sugd.*
on Powers,
323-4.)

Actual fraud is a matter of fact, and therefore proper to be ascertained by a Jury; so that, in such cases, the Court of Equity is generally obliged to direct an issue. Is it not monstrous, then, to drive the party into Equity, in order that he may be sent back to law to ascertain the fact? The distinction is this. Where the fraud depends on matter of fact, the case is cognizable at law, and the jurisdiction of both Courts is concurrent; but where it results from equitable inference only, the Court of Equity has exclusive jurisdiction.

(m) *Hayne*
v. Maltby, 3
Term Rep.
441.)

2. The deed is void also, as against the present defendant. If void between the parties, it can have no effect any where, or against any body. So, a bond given by an infant, or founded on gaming &c., is void in the hands of an assignee. But if good between the parties, it can not affect this defendant; for estoppels do not bind a stranger;(o) and therefore he may plead "*rien passa par le fait*."(p) The plaintiff in Ejectment must recover upon the strength of his own title; and, here, his claim is founded on a fraudulent conveyance, which passes no estate; in this manner as a void bond creates no debt.(q) That

(n) *Pole*
v. Harrobin,
East 417,
note, 3 *Bac.*
321, note a;
7 *Wentw.*
432; *Bates v.*
Groves, 2
Fossey jr.,
295.)

(o) 5 *Bac.*
429; *Co. Litt.*
352; 10 *Vin-*
er 422, 446.

the legal estate passed by the deed of trust can not avail him; because the question is whether the legal estate passed by the deed to the lessor of the plaintiff; for, if not, he can not maintain Ejectment. The deed to him is void, not only as to equitable right, but altogether, and passes nothing. Tho' the defendant can not deny the deed of trust, he still has a right to hold the land against all but him who has the legal title; and the lessor of the plaintiff has not even equal equity; for, tho', as creditor, he has a right to his money, he has none to the estate.

(p) 13
Viner 89;
Gill Law
Evidence
145, 160.

(q) 3 *Co.*
78; 2 *Fossey*
324.

Armistead
1819.



Taylor
v.
King.

(r.) See 2
Wils. 351.

Mr. *Wickham's* rule that only deeds contrary to statutes, or to the general policy of the common law, are void, is too narrow. The cases prove that *all fraudulent deeds* are void. The inconvenience, that, at law, a bond would be avoided, *altogether*, for *one* fraudulent item, makes no difference; for, if so, it is a punishment for the perfidy of the party: but, perhaps, the Jury might, under the Act, find the true sum due; (r.) and, at any rate, the old debt, so far as just, would not be extinguished by defeating the bond. Neither is it important, that a purchaser without notice would not be safe; for such is the effect in every case where the deed is void.

Wickham in reply. Not a single case referred to by Mr. *Call* is analogous in its circumstances to this. For example, *Cockshott v. Bennet*, 2. *Term Rep.* 763, is not a case of a bond, but of a note; in *Hayne v. Maltby*, 3 *Term Rep.* 441, the Deed was *not contradicted*, but avoided by collateral matter; and the case in 9 *East* 417, was one of a bond with *illegal* consideration. There are multitudes of instances, in England and this Country, of relief in *equity* in cases of this nature; but not one of relief at *law*. Does not this shew, that Mr. *Call's* whole argument is founded on a misapplication of the authorities? His client has a mere *equitable* title. The Court of common law does not recognize his having any right at all. Any position that leads to an absurdity, or inconsistency with the uniform course of law proceedings, must be wrong, however plausible it may appear. No doubt, the common law abhors fraud; but there are cases in which it can not give relief against it, tho' a Court of *Equity* can.

The question is, do the *forms* of the common law permit the fraud to be pleaded in such a case as this? In *Chitty* on Pleading, 2 vol. 464, there is a form of a plea of *fraud* to a bond; but it is not supported by any authority, and is not to be found in any other book of Entries. Is there not a substantial distinction between a case, where the party intended to sign a bond for *one* thing, and, by fraud, was made to sign one for a *different* thing, and a case in which the bond he signed was such as he

APRIL
1819.Taylor
v.
King

intended, but his ground of defence is, that he was deceived in the settlement of accounts, and gave it for more than was due? In the former case, the Court of law will give relief on the plea of *non est factum*; in the latter, the only remedy is in equity. The plaintiff's being indictable for the fraud, does not prevent his recovering at law upon the bond.—*Factum valet, fieri non debet*, is the maxim.

Can Mr. Call contend that the Chancellor's sending an issue to be tried at law proves the case to be one in which the Court of law has original jurisdiction? If so, the jurisdiction of the Court of Equity would be destroyed in a great number of cases in which it's existence has never been doubted.

Estoppels operate upon *privies*, as well as parties. The lessor of the plaintiff claims under the trustee, to whom the Deed was originally made, and who has made him a Deed. He is therefore privy in interest.

The Court's opinion was delivered by Judge ROANE, as follows:

This is an action of Ejectment brought by the appellant against the appellee. At the trial, upon the general issue, the appellant relied upon a deed of February 7th 1812, made to him by H. Edmundson, the trustee in a Deed of Trust of February 3d. 1809, executed by Andrew and Charles Lewis to him, to secure the payment of a debt due to Reuben and Randolph Ross, which debt was duly assigned by them to the appellant. Both these deeds are in the common form, and are in themselves unexceptionable. The defendant claims under a Deed from Charles Lewis, for the consideration of \$15,000, made after the trust deed aforesaid, and before the sale to the plaintiff, and was put in possession of the premises. That deed is, therefore, subject to the incumbrance contained in the deed of trust, and must yield to any title legally deduced under it. Both the deeds being unexceptionable as aforesaid on their face, and that of February 7th 1812, being only produced on the trial, it could not be assailed but by evidence.

APRIL,
1819.

Taylor
v.
King.

The Jury found a special verdict, detailing certain acts committed by the appellant at the time of the sale, which *are* fraudulent, as to the defendant; and they also find them to be fraudulent. These facts tended to prevent competition at the sale, by means of which, it is also found, the appellant got the land for about one seventh part of its value. There is no doubt but that, in a Court of Equity, these facts would vacate the sale, and the defendant be deemed to hold the land subject to the trust. Nor is there any doubt, but that, in a Court of law, a fraud may be given in evidence to vacate a deed, if that fraud relates to the execution of the instrument; as, if it be misread to the party, or his signature be obtained to an instrument which he did not intend to sign. It would be too much, however, to vacate a bond at law, because a party was imposed on, in a settlement of accounts which *preceded* its execution, or a bond or deed which was founded on a false or fraudulent statement of facts. Such circumstances go to shew a want of consideration; and a defendant can not avoid a solemn deed on that ground, by parol, in a Court of law. In that Court, and on such an instrument, the principle that fraud and covin vacates every contract, is to be taken in subordination to another principle, namely, that the party is estopped from averring a matter of the kind against a specialty. If this position needs support, it may be found, among other cases, in that of *Mease v. Mease, Cowp.* 47, and *Dorr v. Munsel*, 13 *Johnson's N. York rep.* 430. In the last case it is expressly decided, that the fraud to be proved upon a plea of *non est factum*, must be such as relates to the execution of the instrument.

With respect to the *Deed* in this case, it is not at this day to be questioned that the Deed of a Trustee conveys a *legal* title. The Trustee himself takes a legal, though defeasible title; and that title becomes absolute in his vendee, by the Deed, in a Court of law.

We are also of opinion that, in a Court of law, the Vendee need not shew that the conditions of the Trust deed have been complied with. There have been some

opinions and dicta in this Court(1) seeming to countenance a contrary idea; but this is our opinion upon due consideration. While, however, the vendee gets a legal title by the mere execution of his deed, the original owner of the land, or his alienee, is not to be injured by a breach of trust on the part of the trustee. A purchaser from him, the requisitions of the Deed not being complied with, does not, in equity, get a complete title. He does not get it, because, until then, the trustee is not authorized to convey it.

On these grounds, we find ourselves compelled to reverse the judgment, and enter one for the appellant.

ARRA,
1819.

Taylor
v.
King.

Harris against Harris.

Decided,
April 7th,
1819.

AT the trial of this cause, (which was an Ejectment by *Thomas H. Harris* against *Thomas Harris*, in the Superior Court of Henrico County,) the plaintiff introduced in evidence a deed of trust from *Thomas Harris* and wife to *Andrew Stevenson*, dated the 2d of February 1809, and recorded the 6th of the same month; also a deed of bargain and sale executed by the said trustee to *Thomas H. Harris*, dated June 30th, and recorded July 2d., 1810; whereupon the Counsel for the defendant moved the Court to instruct the Jury that the legal title to the land in controversy, did not pass from the trustee to the purchaser, (the lessor of the plaintiff,) who was also the creditor, by the said last mentioned deed, unless the lessor of the plaintiff would prove that the trustee had complied with the terms prescribed by the Trust Deed, as to the advertising, sale and conveyance of the said land; which instruction the Court did give to the Jury; and thereupon the plaintiff excepted; setting forth all the deeds in *hæc verba*. Verdict and judgment for

1. The 3d. point in the case of *Taylor v. King*, again decided.

(1) Note. See *Pollard v. Taylor's devisees*, 4 H. & M. 339, *Ibid.* 136-7; and *Ross v. Norvell*, 3 Mansf. 182.

April,
1819.

Harris
v.
Harris.

the defendant; from which the lessor of the plaintiff appealed.

Buchus and Wickham for the appellant.

Leigh for the appellee.

Judge ROANE pronounced the Court's opinion, as follows:

For some of the reasons assigned in the case of *Tuglor v. King*, the Court is of opinion that the instruction of the Superior Court is erroneous in this, that it did not admit that the *legal* title to the land in controversy passed by the Deed in the exception mentioned, unless the lessor of the plaintiff would prove that the terms prescribed by the Trust Deed had been complied with. The Judgment is therefore reversed with costs, and a new trial awarded, in which, if requested, a contrary instruction is to be given.


Ellison and others *against* Woody and others.


Decided,
April, 9th,
1819.

MICAJAH WOODY, SENR., of the County of Hanover, by his Will, dated Sept. 23d, 1771, and admitted to record Feb. 2d, 1775, *lent* to his wife the land and plantation whereon he resided, and all the rest of his estate, be it of what kind or quality soever, during her widowhood: then, absolutely, to one he gave to his daughter *Constantia Spur* six pounds, and of his sons, *saying nothing expressly or by evident implication of her increase; such increase, born after the death of the testator, and during the life of the widow, do not pass by a general residuary clause to all the children, but belong to the remainder-man: such as are born before the testator's death, and not otherwise disposed of by the Will, do pass by such residuary clause.*

2. Under a bequest to a daughter of the testator, of the first child a certain negro woman shall raise, the legatee is entitled, not to the first child *born after the death of the testator, and thereafter raised*, but to the first child that shall be *raised, whether born before or after the testator's death.*

3. If a testator give to one of his children a pecuniary legacy; expressly declaring that sum to be *all he intends such legatee to receive of his estate; a general residuary bequest, to "all his children"* (without mentioning names,) must be construed as not including *that child.*

APRIL,
1819.

 Ellison and
others


 Woody and
others.

no more; she having received of him already what he thought sufficient of his estate; to his daughter *Lurana Woody* six pounds cash, and one cow, to be raised out of his estate; to his daughter *Sarah Ellison*, 50 acres of land, on which she then lived, to her and her heirs forever; to his daughter *Cecilia Ellison*, one negro man named Jack, and a woman's riding saddle; to his son *William Woody*, the plantation and land whereon he resided, containing by estimation 150 acres, with the improvements, to him and his heirs forever; to his daughter *Agatha Woody*, the first negro child his negro woman, named Beck, raised, one feather bed and furniture and one saddle; to his son *William Woody*, the said negro woman Beck; to his daughter *Ursula Woody*, one negro man named Peter; to his daughter *Massie Nance*, six pounds cash, and two sheep; to his daughter *Mary Woody*, one negro boy named Ben, and one feather bed and furniture; to his wife *Cecilia Woody*, one negro woman named Nan, absolutely: concluding with the following residuary clause; viz.;—"Item, all the rest and remainder of my estate, be it of what nature or quality soever, *not here-in particularly before given, or mentioned to be given away*, it is my will *all my children* above mentioned may have it equally divided among them."

Cecilia Woody the widow, died in the month of July 1800. After the date of the Will, and *before the death of the testator*, the negro woman Beck had two children, named *Pat* and *Isham*; and *after the death of the testator*, she had a child, named *Jack*, who was raised. *Pat*, the daughter of Beck, had six children in the life time of the said *Cecilia Woody*. Beck had also a daughter, named *Nancy*, born after the birth of Jack, in the same life time.

A certain *Thomas Johnson* (who afterwards died intestate, and insolvent as it was said,) qualified as Executor under the Will; but, as the testator died free from debt, the widow during her life held and enjoyed all the estate. After her death, *William Woody* took possession of all the slaves. He sold the negro man *Isham* to a certain *Joseph May*, and delivered the negro woman *Pat*, (as the

April,
1819.

Ellison and
others

v.
Woody and
others,

first child raised by Beck,) and all the increase of *Pat*, to *Agatha Woody*, as belonging to her under the Will; retaining or selling as his own property, all the increase of *Beck* born after the testator's death. *Thomas V. Nance* husband of *Massie Nance*, took possession and made sale of the personal property, which amounted only to the sum of 75l. 6s. 6½d.

In March 1801, *Sarah Ellison* and others, claiming under the residuary clause in the Will, filed a Bill in the Superior Court of Chancery for the Richmond District, against *William Woody* and others; upon which, and an amended Bill afterwards filed, various proceedings and orders took place, which need not here be mentioned.

On the 12th of June 1815, Chancellor TAYLOR pronounced his Opinion; that the negro woman *Pat*, who was the first born child of the negro woman *Beck*, tho' born in the life time of *Micajah Woody* the testator, rightfully belonged, with her increase, to the defendant *Agatha Woody*, to whom she and they had been delivered by *William Woody*; that the children born of *Beck* in the life time of *Cecilia Woody* the testator's widow, in like manner belonged to the said *William Woody*, to whom the said negro woman *Beck* was given in remainder by the testament of the said *Micajah Woody*; that *Isham*, the only other child of *Beck*, born in the testator's life time, passed, under the residuary bequest in the said testament, to all the children of the testator, except *Constantia Spur*; that the said negro *Isham*, having been sold by the defendant *William Woody* to the defendant *Joseph May*, ought to be surrendered by the said *Joseph May* to Commissioners appointed to sell the said slave; and that the profits of *Isham*, which accrued between the death of the testator and the time when the defendant *William Woody* sold him to *Joseph May*, should be accounted for by the said *William Woody*; and that the said *Joseph May* should account for the profits of the said slave received by him, and until he should surrender him as aforesaid.

The Decree therefore was, that *Joseph May* should surrender the said slave to Commissioners, who were ordered to sell him, and to divide the proceeds in conformity

with the said opinion; that accounts be taken of the profits of *Isham*, for which the defendants *Woody* and *May* were severally responsible; and reported to the Court, &c.

APRIL,
1819.

From this decree, the plaintiffs appealed.

Ellison and
others

Mumford for the Appellants.

v.
Woody and
others.

The points in controversy in this case depend upon the true construction of the Will of *Micajah Woody* deceased.

The testator's intention must prevail, where not opposed by any rule of law. To ascertain that intention, the whole Will must be taken together; and the circumstances under which it was made may be taken into consideration. (a)

(a) *Reno's*
Executors v.
Davis and
Wife, 4 H. &
M. 283; and
p. 291, Judge
Beane's opi-
nion. 7 Bac.
342.

Apply this rule to the Will in question. Upon its face, the testator appears to have been a man in middling circumstances, endeavouring to make some provision for every one of his numerous family, of nine children, after providing a maintenance for his wife during her widowhood. He appears to have possessed at the date of the Will only two female negroes; viz. Beck and Nan. He gives Beck to *Wm. Woody*, and Nan to his wife, absolutely, (but saying nothing of their increase,) after lending all his estate real and personal to his wife during widowhood. He bequeaths to his daughter *Agatha*, the first child whom Beck should raise; shewing thereby that he considered the progeny of Beck, whom he knew to be a young breeding woman, as one of the means of providing for his other children, who, without this provision, would have little or nothing; and, immediately after giving Nan, without mentioning her increase, he says, "Item, all the rest and remainder of my estate, be it of what nature or quality soever, not herein particularly before given or mentioned to be given away, it is my will all my children above mentioned may have it equally divided among them." It is evident, from the strong wording of this residuary clause, and all the circumstances taken together, especially the smallness of the residuary fund, if the increase of Beck and Nan were not included in it, that he must have intended to comprehend that increase in the residuum.

ARAZ,
1819.

Ellison and
others
v.

Woody and
others.

The words, "be it of what nature or quality soever," shew that he contemplated not only the household furniture, &c. but *slaves*, which, when this Will was written, and also when the testator died, were to many purposes *real estate*; at all events, that he contemplated different species of property; which words can not be satisfied without including the children of Beck. Besides, it must be admitted that the increase of Beck are not "*particularly mentioned or given away in the foregoing part of the Will:*" they are therefore expressly included in the terms of the residuary clause.

Even if those terms had not been as strong as they are, it has been repeatedly decided that a general residuary clause passes all *personal estate*, which is not otherwise sufficiently disposed of. (b) The case of *Cole v. Claiborne*, 1 Wash. 262, shews that, in this respect, *slaves* were governed by the same Rule.

(b) 4 Bac.
429, and the
authorities
there cited.

It may be contended, that, according to the maxim, "*partus sequitur ventrem*," the gift of Beck, without any other words, was a sufficient gift of her children. It might be so, in a case where no express words or conclusive circumstances demonstrated the intention of the testator to be otherwise. I admit that, in a *doubtful case*, (as Judge ROANE says in *Reno's executors v. Davis*,) "the law of humanity ought to turn the scale, and prevent the separation of the children from their mother." But, if the testator chuses, he has the right to give the children to one and the mother to another; and, in the case before us, he has done so by plain and positive words.

As to Pat and her children, the bequest to *Agatha Woody* of "the first child Beck raises," must be construed as applying to the first child *born of Beck*, and raised by her, *after the testator's death*; because a Will does not take effect until *then*, and operates from *that time*: for "a Testament is a just and complete declaration or sentence of a man's mind, or last will of what he would have to be done with his estate, *after his death*," 7 Bac. 299.

Wickham contra. This case is settled already; for it

has been repeatedly decided that, where slaves are given for life, the remainder-man is entitled to their increase.

If the testator intended the increase as a fund for his other children, why did he not say so?

Beck being given to *William Woody*, her children followed of course. It was not necessary to mention them.

Mr. WYTHE had no doubt upon this point. The residuary clause made no difference; if there had been no such clause, the effect would have been the same.

The bequest to *Agatha Woody* was not of the first child Beck should have, but of the first that should be raised, whether born before or after the death of the testator.

Suppose Beck had had no child born after the testator's death; then *Agatha Woody* would have received nothing according to Mr. *Munford's* construction.

Munford in reply. I wish Mr. *Wickham* had produced the cases, in which he says it has been settled, that the remainder-man, upon the termination of an estate for life in slaves, is entitled to their increase.

If he had, I believe it would have been found that none of them resemble this. Admit, that in general, where the Will contains no words disposing of the increase, the law is as he has stated; yet, where, as in this case, the testator's intention appears to be to establish a different rule, such intention must prevail. Here the Will by the residuary clause expressly disposes of the increase: the remainder-man is therefore not entitled.

April 9th 1819, Judge ROANE pronounced the Court's Opinion, that the Decree be affirmed.

April,
1819.

Ellison and
others

v.
Woody and
others.

Decided,
April 12th,
1819.

Carrington's executors against Belt and wife.

1. A testator CODRINGTON CARRINGTON of the County of Cumberland by his Will, dated August 6th, 1811, appointed Doctor Samuel Wilson, and Alexander Carrington, (one of his Sons,) his Executors, and vested in them the whole of his estate, to be by them divided, among his heirs, from time to time, as they might think most conducive to the interest of his estate and family. He also empowered them to dispose of all his landed or real interest in the undivided estate of Edward Carrington deceased, and to sell all his interest in the lands heired from his father's Estate in the State of Kentucky; and to use the assets arising from such sales, as, in their opinions, might seem most conducive to the interest of his family." He left six children; one of whom (Elizabeth Anne,) having married Addison Belt, a Bill was filed by the said Belt and wife, in the Superior Court of Chancery for the Richmond District, against the Executors, and other children of the Testator, all of whom were infants, praying a settlement of the administration accounts, and allotment to the Complainants of one sixth part of the estate real and personal.

A guardian *ad litem* being appointed, an answer was filed for the Infants, referring to and relying upon the following facts:

1. The testator, in the above recited Will, empowered his Executors to divide his other lands, and his slaves, among his heirs; but not to sell them; nor to make an unequal division; nor to give certain classes of the property to some of the devisees, and others to others. (1.)

2. In a doubtful case, the Court should lean against a construction, which, in effect, would leave the daughters destitute of a permanent provision, by giving them personal instead of real property.

3. In the case stated, altho' the words giving power to divide the estate, "from time to time, &c." are very extensive, the Court should rather consider them as authorising the Executors, under circumstances, to deliver the property to the devisees, before attaining legal age or marriage, than to hold it up, indefinitely, thereafter. If, thereafter, they could, under any circumstances, suspend an allotment, the circumstances must be such as to render the division more injurious to the interests of the estate and family, then, than at a future period.

4. If, under such Will, the Executors refuse to make an equal allotment to a devisee of full age or married, it may be made by Commissioners appointed by, and acting under the control of, a Court of Equity.

(1.) Note. See *Kemp v. Kemp*, 5, Vesey, jr. 849-862.

Answer of the Executors, which stated, that, "by the
 " terms of the Will, (as they were advised,) " a *discre-*
 " *tionary* power was vested in them, as to the *time* and Carrington's
 " *manner* of allotment, or allotments, and division, to executors,
 " be made among the children: that the testator died v.
 " seised of two tracts of land in the County of Cumber- Belt & Wife.
 " land, on Willis's River; one containing about 1470
 " acres, and the other about 260 acres; that he also left
 " from 70 to 80 slaves, or thereabout:—his share of the
 " estate of *Edward Carrington* deceased, had not been
 " disposed of, and, as it was subject to division among
 " a number of persons, it was uncertain when it might
 " be:—the Kentucky lands were believed to be of very
 " little, if any, value. The Respondents were of opini-
 " on, that the lands in Cumberland could not be equally
 " divided into six different tracts, without greatly im-
 " pairing the value of each; that, if *real* estate could be
 " assigned to *some* of the children, and *personal* to *others*.
 " all would probably be benefited thereby. They were
 " ready to submit to the Court a *plan* for a division, or
 " to make *such* division, if the Court should think they
 " or either of them had authority to do so. They thought
 " that the *whole* property ought not *now* to be divided,
 " but were willing, under the power given them by the
 " Will, to allot to the plaintiffs a *portion* of the said pro-
 " perty. Monies and other supplies would be wanting
 " for the education and maintenance of the younger chil-
 " dren, and for the support and care of the aged mother
 " of the testator, who was a member of his family, and
 " in a state of great infirmity of mind as well as body."

Sundry depositions were filed, on both sides, contain-
 ing various and conflicting opinions of Witnesses, con-
 cerning the management of the estate by the Executors,
 and the expediency of a division of the lands in Cumber-
 land into six equal parts. Chancellor TAYLOR, at Janu-
 ary Term 1819, appointed Commissioners to allot to
 the plaintiffs one equal sixth of the lands and slaves,
 of which the testator died seised and possessed, upon
 their giving to the Executors bond and security for re-

APRIL,
1819.

Carrington's
executors,
v.

Belt & Wife.

funding their due proportions of any debts or demands which might thereafter appear against the estate, and the costs attending the recovery thereof; and also directed the Executors to render an account of their administration, before a Commissioner of the Court, to be by him reported, &c.

From this interlocutory decree, an appeal (being refused by the Chancellor,) was granted by this Court, upon petition. (a)

(a) See
Acts of 1815,
c. 8. § 3; R.
Code of 1819,
c. 66. § 57.

Judge ROANE pronounced the Court's opinion as follows:—

The Court is of opinion, that, according to the true construction of the Will of *Codrington Carrington*, among the proceedings, his Executors were empowered to *divide* his estate among his *heirs*, and not to sell it. This result arises, not only from these precise expressions being used therein, in relation to all his Estate except his interest in the estate of *Edward Carrington* deceased, and in the lands heired from his father in Kentucky, but also from his empowering his executors to *sell* these last mentioned interests. That circumstance, added to the other, excludes the power to sell the interests in question. In effectuating this object, it was the intention of the testator to select his executors, in preference to others, for the purpose of a judicious division and allotment; but not to give them a discretion to *sell* the property, instead of dividing it, or to make an *unequal* division of it.

The Court is also of opinion, that the Will does not enable them to give certain *classes* of the property to some of the devisees, and others to others. In a doubtful case, the Court would lean against a construction which, in effect, would leave the daughters destitute of a *permanent* provision, by giving them *personal* property, instead of *real*, and which on marriage would become the property of their husbands. Altho' the words of the Will giving power to the Executors to divide the Estate, "*from time to time,*" &c., are very extensive, the Court rather inclines to consider them as authorising the Executors, under circumstances, to deliver the property to the devisees, *before* they have attained their legal age or

marriage, than to hold up the property indefinitely, thereafter, and when the children of the testator, and their families, might be suffering therefor. If, under any circumstances, this power would authorise the Executors to suspend an allotment after the devisees had come of age or were married, these circumstances must be of a character to render the division *more* injurious to the "interests of the estate and family," *then*, than at a future period. No such circumstances are pretended to exist in the case before us; and those relied on would *always* equally apply against the division of the lands in question.

April,
1819.
Carrington's
executors,
v.
Belt & Wife.

The Executors having declined an allotment in favor of the appellees, for the reasons they have assigned, no alternative was left them but to apply to a Court of Equity to have the division made by others; and, on the report of the Commissioners, the particulars of the division will be open to objection and reform. The Court of Chancery will also take care that no injury ensues to the estate by making the division at an unseasonable period.

For these reasons, we approve of the Decree; which is to be consequently affirmed.

Pendleton's administrators against Stuart and M'Coull.

Decided.
April 13th,
1819.

THIS was a Bill of Injunction, exhibited by *George 1. Not-*
Pickett and others administrators of *John Pendleton* de- *withstanding*
administrators, *as such*, in an action of debt, to which they pleaded "payment by *the intestate*," and a subsequent judgment, against them *personally*, in an action suggesting a *devastavit*, to which they pleaded "*no waste*," relief in equity was granted them in this case; on the grounds, that the peculiar and perplexed state of the assets made it *difficult, if not impracticable*, to plead in relation thereto, at law; and that, at the trial of the *second* action, their principal counsel was absent, and their assistant counsel withdrew from the cause; in consequence whereof, they were wholly undefended, and a verdict, perhaps contrary to justice, was obtained against them, without any negligence or default on their part.

APRIL
1819.


Pendleton's
administrators
v.
Stuart and
McCoull.

ceased, in the Superior Court of Chancery for the Richmond District, to stay proceedings upon a judgment against them, in an action, suggesting a *devastavit*, in behalf of *Norman Stuart*, for the benefit of *Niel M. Coull*, founded upon a judgment in a previous action of debt upon a specialty, to which they had pleaded "payment by the intestate," whereupon a verdict had been found against them.

The grounds of Equity set forth in the Bill were, that the Complainants had not, at the time of rendering the said judgment, nor ever had, any assets, out of which they could properly pay the said debt; that various impediments, (detailed at large in the Bill,) among which was the pendency of several suits in Chancery, the result whereof was uncertain, and upon which the *quantum* of assets depended, had prevented their pleading fully administered; that their Counsel informed them, when the trial was about to come on, that he could not, while the amount of the assets was so uncertain, put in that plea for them, and advised them that, at all events, they would be protected by the Act of Assembly, passed the 13th of January 1807, entitled, "*an Act concerning the abatement of suits, and Executors and Administrators*:" (a) that in the subsequent suit suggesting a *devastavit*, they were ruled into trial in the absence of the Counsel who had attended to the greater part of their business for the estate in the Court, and on whose attention they principally relied for their defence, notwithstanding their motion for a continuance upon the ground that he was at the time gone to Kentucky; and, under these circumstances, judgment was obtained against them, notwithstanding such of the intestate's effects as were not contested, had actually been applied to, or were bound by, claims of superior dignity to that of *Stuart*, as would appear by the Commissioner's report, in another suit, referred to and made an Exhibit.

Chancellor TAYLOR granted the Injunction, upon the terms of the Complainants' confessing judgment upon a forthcoming bond, and executing the usual release of errors at law.

(a) Edit.
1808, c. 101.
p. 127; R.
Code of
1819, c. 104.
§ 36, p. 384.

APRIL,
1819.

 Pendleton's
administrators
v.
Stuart and
M'Coull.

The answer of *Stuart* stated that the judgment in his favour had been transferred to *M'Coull*; and that of *M'Coull*, relied upon the Estoppel created, at law, by the original judgment upon the plea of "*payment*," as proof that they had in their hands assets sufficient to discharge the same; and upon the return of *nulla bona* as conclusive evidence of the *devastavit*: remarking, too, that the involved situation of their intestate's affairs, if such as the complainants represented, might have been urged with propriety as a ground for the continuance of the original suit; and, if a motion to that effect had been made and overruled, they might, as the respondent was advised, have had relief "*in a Superior Court of law, or, at least, in a Court of Equity*; or, if the Complainants had shewn the difficulties and embarrassments mentioned in their bill, and that they had no assets, during the pendency of that action, they might then have applied to a Court of Equity to restrain proceedings at law, until a reasonable time had been allowed them to examine the situation of their intestates' affairs; or they might have compelled the plaintiff in that action to take a judgment, *when assets*, and thus have thrown the burthen of proof upon him, to shew, at any future time, that assets had come to their hands: but, instead of this, they thought proper to rely on the plea of *payment*! The difficulties in relation to the mode of proceeding, seemed to this respondent altogether imaginary. If the complainants had no notice, at the date of the original judgment, of the existence of claims of superior dignity sufficient to consume the assets, they were bound to discharge the said judgment, and plead the same in bar to suits subsequently instituted: if they had notice prior to that judgment, they ought to have pleaded those claims in bar; shewn that they were sufficient to swallow up the assets; and given a judgment, *when assets*. But, even if the complainants might have availed themselves of the ground of relief set forth in their bill against the original judgment, it was too late to rely upon such grounds after a suit had been prosecuted on that judgment, suggesting a *devastavit*, and a judgment obtained against

April,
1819.

Pendleton's
administrators

v.

Stuart and
McCoull.

them on the plea of "*no waste.*" As to the pretence that they were improperly ruled into a trial in the absence of their Counsel, if the Court erred in this respect, it was competent to a superior Court of law to correct the error: but the fact was, that, although one of the Counsel employed by them was absent, they had counsel present in Court, of long standing at the bar, retained in their behalf a considerable time before the trial, and every way qualified to defend them.

The Chancellor dissolved the Injunction, and, notwithstanding *affidavits* afterwards filed in support of the Bill, refused to re-instate it.

The affidavit of *William Marshall* stated, that, soon after administration was granted on the estate of *John Pendleton*, the Complainants employed the deponent to attend to the business of the estate in the County Court of Henrico and Hustings Court of the City of Richmond; when a great number of suits were soon instituted; that, upon conversation with the complainants or some of them, he was informed that the assets were in a very embarrassed situation, in consequence of difficulties about the title to sundry certificates, for services and supplies rendered the public, found in the said *Pendleton's* possession, and claimed by other persons and the Commonwealth, on which suits were instituted, and an unsettled administration account of the estate of *Mr. Heitman*, on the favorable termination of which suits the ability of the Complainants to pay the demands against them, then in suit, depended.

"The deponent *thinks* that, under these circumstances, he obtained a continuance of the causes, but, at a subsequent Court, not being able to state the probable time when the difficulties would be removed, he was *compelled to go to the trial of the cases then ready*, which he felt little reluctance in doing, as he felt satisfied that the defendants at law would not be subjected to the payment of more than the assets which really came to their hands, although judgment to a greater amount might be rendered against them."

The affidavit of *Charles Copland* stated, that he was employed as an assistant Counsel to *William Marshall*, by the administrators of *John Pendleton*, to defend them in a suit brought against them by *Norman Stuart*, in the Court of Henrico, suggesting a *devastavit*; that the cause was set for trial at a time when *William Marshall* was absent on a journey from home; that the deponent moved the Court for a continuance on the ground of Mr. *Marshall's* absence, who was the Counsel relied on, and had been engaged in the defence of the suits brought against the administrators; but the Court refused to grant the continuance. The deponent stated to the Court that it was a cause of great importance to the defendants; that he had been only employed to aid in the defence; that he was unacquainted with the merits of the case, and wholly unable to go into the trial; and that, if the Court would not continue the case, he should withdraw himself from the suit: but the Court was inexorable. The deponent then directed his name to be stricken from the docket; and the cause was tried and determined without any defence.

APRIL,
1819.

Pendleton's
administrators
v.
Stuart and
McGuff.

Upon a Petition, an appeal from the decree was granted by this Court. .

Cull for the appellants, observed, that he never knew a case, until the present, in which an Executor, who in fact had fully administered, was refused relief in Equity. (a) Where the Court below ought to have granted a

(a) See
Mays v.
Bentley, 1
M. S. Nov.
3d. 1800.

continuance, this Court has repeatedly decided the judgment not to be binding. The difficulty and length of the plea of *fully administered*, is a good excuse for not putting it in. (b) The circumstance that the Court of law

(b) See
Judge PEX-
PLETON's re-
marks in
Downman v.
Downman's
ex'ors. 1
Wash. 28.

has jurisdiction, does not always take away that of the Court of Equity; but the jurisdictions of both are concurrent:—especially, where the Court of Equity once gets jurisdiction, it does not lose it on the ground that the Court of law has it also. In many cases, therefore, Equity gives a defendant relief, though he might have obtained it, at law, if he had pleaded; as in the cases of gaming, usury, and the like.

APRIL
1819.

Pendleton's
administrators,
v.
Stuart &
McCoull.

Is a plaintiff entitled, in conscience, to the benefit of a judgment, for assets which the executor never received?

Whether a new account was necessary, or not, seems doubtful. According to the British authorities, an account taken in any one cause, may be read as evidence in another, if no exception be taken.

Wickham on the same side, referred to *Priest's ex'or. v. Fuqua's ad'mr.*, 4 *Munf.* 68, as shewing that the appellants ought not to be prejudiced, even if their Counsel were mistaken as to the proper defence at law.

William Hay, jr. contra.—It is not true that, when this judgment was obtained, there were no assets to satisfy it. The act of Assembly indeed made the Decree, directing the *residuum* in *Pendleton's* hands, as administrator of *Heitman*, to be paid to the Commonwealth; there being no distributees, a debt of the first dignity; but *Hopkirk's* claim as a creditor, against *Pendleton* executor of *Gunn*, does not appear to be of superior dignity to our's. A claim against an executor for a *devastavit* is, in England, a simple contract debt. In this country, I admit it to be a *specialty*, because the Executor gives bond, and the damages may be ascertained by the judgment: but, as to *creditors*, it is no higher than a *specialty*; for the act of Assembly is not in favor of *creditors*, but of *legatees* or *distributees* only. (c) The distinction of the dignity of debts, is an *odious* one, and therefore ought to be *strictly* construed. A large payment too, was made by the administrators to an open account.

(c) Edit. of
1792. 1503,
and '14 c.
92, §. 53, p.
167.)

I am willing to admit that, notwithstanding mispleading &c. in the *original* suit, they might have shewn, in the action suggesting the *devastavit*, that in fact they had no assets. The intention of the Act of 1806 was to remove the estoppel produced by the *first* judgment. But, surely, it was not intended to give an Executor the unlimited privilege of failing to make *any* defence at law, and of then going into Equity. After a judgment in an action suggesting a *devastavit*, it is surely too late to ask relief of a Court of Equity on grounds which might have been taken in opposition to *that* action.

There was no difficulty in making defence at law in this case. The plaintiff might have been compelled to accept a judgment payable *when assets*; (d) for the certificates of public debt were, like bonds, only evidences of debt, and not assets in hand until turned into money; and, besides, a suit was pending to determine whether they belonged to the estate of the intestate, or not. Suppose the Executor had entered, in the Inventory, a negro or horse; might he not have defended himself at law, by shewing a suit of a third person pending against him for the specific property? The number of claims is nothing to the purpose. The administrators ought not to have amused the plaintiff by proceedings at law; but, if necessary, should have filed a bill of conformity in the first instance. Neither is the rejection of their motion for a continuance, any ground for coming into Equity; for they might have excepted to the Court's opinion, and appealed. In short, every defence now relied upon, might have been made in the second action; in which the whole merits came in question, and the plaintiff was bound to prove the defendants guilty of the *devastavit*.

Cases of gaming and usury are not like this, but founded on special acts of Assembly, making the bonds or other securities, in such cases, *utterly void*. It is said to be monstrous iniquity to refuse relief to an *Executor*, who has no assets. But there is equal hardship in other cases, whenever a defendant has failed to make defence at law, without good excuse for such neglect. Executors and Administrators are not *privileged* persons.

Wickham in reply. The circumstance that a contest was pending concerning the right to the certificates, could not be pleaded, nor given in evidence upon a *special* plea of *fully administered*. The *general* plea would not answer the purpose. Certificates are considered assets, as much as Bank notes, which are not *money*, but are *assets*, because they can be turned into money. So also is stock in the funds of the United States. Certificates circulate from hand to hand without assignment. The administrators asserted a *right* to the certificates, which were in their *possession*:—of course, they could not plead that

APRIL,
1819.

Pendleton's
administrators,
v.

Stuart &
M'Coull,

(d) *Roll's*
Ab. 920.
Owen 36; 2
Selwyn's N.
P. 65 ci-
ting *Smith v.*
Davis.

April,
1819.

Pendleton's
administrators,
v.
Stuart &
McGoull.

they were not assets. Under such circumstances, no plea could have been filed at law that would have protected them.

The continuance was properly refused. The Court *can not* compel a plaintiff to take judgment *when assets*; neither ought it to continue a suit at law *ad infinitum* on the ground of the pendency of a suit in Chancery; but should leave the party to be protected by the Court of Equity.

Surprise, mistake, the Court of Chancery's having jurisdiction, *whose decree can not be pleaded at law*, are equally arguments for relief, after judgment in the action for the *devastavit*, as after judgment in the original suit.

In this case, the administrators were guilty of no neglect. Their Counsel deserted their cause:—but no defence that could have been made, would have protected them. As the case now stands, it is *prima facie* apparent that the plaintiff at law ought not to recover.

Judge ROANE pronounced the following Opinion of this Court.

Owing to the peculiar and perplexed state of the assets in this case, making it *difficult, if not impracticable*, for the appellants to have pleaded in relation to them, at law; and owing, also, to the absence of the principal Counsel of the appellants, and the withdrawal of the other, at the trial in the *second* action, whereby the appellants were wholly undefended, and a verdict, perhaps contrary to justice, obtained against them, without any negligence or default on their part; the Court is of opinion that the Decree is erroneous and ought to be reversed, the injunction re-instated, and the cause remanded, to have an account of the assets taken, if required, in order to a final decree.

Banks and others against Booth.

Decided,
April 16th,
1819.

UPON a Bill filed in the Superior Court of Chancery for the Williamsburg District, in behalf of *Harriet A. Booth*, an infant, by *George W. Booth* her guardian, against *William Banks*, *James Banks*, *Nathaniel Hawkins* and *Elizabeth* his wife, children of *Andrew Banks* deceased, for the purpose of perpetuating the testimony of Witnesses in relation to, and establishing as the last Will of the said decedent, a paper found in his desk after his death, purporting to be such Will; by which he devised and bequeathed a tract of land, with the slaves, stock and other property thereon, to the said *Harriet A. Booth*; and another tract of land with slaves, &c., to a certain *Elizabeth Bingham*; which paper was concealed and suppressed by the defendants, or some of them; it appeared from the Answers and Depositions, that such a paper as that described in the Bill, was in existence shortly after the death of the said *Andrew Banks*, and in the possession of the defendants; that it was in the hand writing, and signed with the name of the said *Andrew Banks*, but not attested by any witness. It gave all his property to the said *Harriet A. Booth* and *Elizabeth Bingham*, leaving nothing to his children. From his habits of intoxication, and other circumstances, it appeared very probable that he was not in his senses when he wrote it. And if he was, it was doubtful, from the testimony, whether he seriously intended that writing as a Will, or only to alarm his son *James Banks*, (with whom he had a quarrel about that time,) by letting him see what it was in his power to do. He was afterwards reconciled to *James*, and declared it was his wish that his property should be equally distributed among his children after his death. In his last illness, he said nothing about that paper, or the making a new Will; but a witness was of opinion that he was then incapable of making one. A previous Will, also in the hand-writing of the said *Andrew Banks*, and regularly attested, bearing

1. Notwithstanding a paper purporting to be a Will, be proved in a suit in Chancery, to have been wholly written and subscribed by the supposed testator, yet if upon the evidence, (there being no attesting witness,) it be doubtful, whether, at the time he wrote it, he was in a proper state of mind to make a testament; whether it was serious-ly intended by him as such; or, if so, whether it has not been subsequently nullified, by the republication of a former Will; a revocation of it, or otherwise; the Court ought to direct issues to ascertain such facts, before any decision of the cause.

APRIL,
1819.

*Banks and
others
v.
Beoth.*

date in the year 1802, was found in the same Desk, with the said paper dated *November 25th 1807*. A witness swore that, "*just before Christmas in 1807*, he was over "in James City; and, as he was going down to the river "to go over, the deponent was with him and his son "*James Banks*, when *Andrew Banks* observed he had "made a *just Will*; that was, he had made his *children all* "equal, as he had done previous to his coming to that "place to reside; that is, that he had given most to such "of his *children* as had done most for him; and had de- "posited the Will in a friend's hands."

The Chancellor decreed, that the Will stated in the Bill to have been made by *Andrew Banks*, be established as his true last Will and Testament; and that accounts be taken of the slaves and other property thereby bequeathed to the plaintiff, and of the hires and profits thereof, &c. From which decree, the defendants appealed.

Judge ROANE pronounced the Court's Opinion, as follows:—

Upon the proofs in this case, taken in connexion with the suppression of the Will of 25th Nov. 1807, by the appellants, or some of them, which, in this particular, warrants the strongest presumption against them, we have no doubt but that that Will was written by *A. Banks* the supposed testator, and contained a clause such as that stated in the Bill. It is not certainly known to us, however, whether, at the time he wrote it, he was in a proper state of mind to make a testament; whether it was seriously intended by him as and for his last will and testament; nor, if so, whether it has been subsequently nullified by him by the republication of a former will, a revocation of it, or otherwise. These enquiries are essential to a just decision of the cause, and are to be made under issues directed by the Court of Chancery. For the purpose of making them, the decree is to be reversed, with costs, and the cause remanded to the Court of Chancery to have the issues instituted. On the trial of these issues, the Court of Chancery shall cause the two wills mentioned in the proceedings to be produced, if

practicable; and, on the report of the issues, decree accordingly.

Some of the Court, also, verbally, suggested to the Counsel, the consideration of the propriety of making Miss Bingham a party to the controversy.

APRIL,
1819.

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Banks and  
others  
v.  
Booth.

## Mountjoy and Triplett against Banks's executor and devisees and others.

Decided,  
April, 10th,  
1819.

THOMAS MOUNTJOY and Daniel Triplett filed their Bill in the High Court of Chancery, in June 1801, against the executor and devisees of Gerard Banks deceased; and, afterwards, by an amended bill, made William Richards and Nathaniel Fox, the sureties for the executor in his administration bond, also defendants.

The plaintiffs, having been sureties for the said Gerard Banks in his Official Bonds as Sheriff of Stafford County, dated the 10th of October 1785, were compelled by a Judgment of the General Court to pay on his behalf a sum of money, on account of the taxes of that year, which his deputies failed to pay into the Treasury. The object of the Bill therefore was to obtain reimbursement of that sum; and the reasons assigned, for coming into a Court of Equity, were, 1st. that the bonds given by the said Banks and the plaintiffs were found to be joint only and not joint and several; and, therefore, Banks having departed this life, a suit in the name of the Governor for their benefit, upon one of those bonds, could not be maintained at law against the said Executor, according to a recent decision of the Court of Appeals; (a) but relief ought to be given them in equity, because they received no emolument from the said Banks's getting the office of Sheriff, but became his sureties upon his intreaty, and from friendship to him, without any advantage to themselves:—2dly, that, altho' the executor had, at various times, professed his readiness to indemnify them

1. If an official bond, given by a Sheriff and his sureties, before the act of 1786, be so worded as not to be joint and several, but joint only; a Court of Chancery is the proper tribunal to give the sureties relief against the estate of the Sheriff after his death; upon their being compelled to pay a sum of money for a delinquency of such Sheriff in his life time.

(a) See Richardson v. Johnston, 2 Call 527; & Watkins's ex'ors v. Tate, 8 Call 521.

"a time anterior to that of payment, and from a period  
"not demanded, or even stated, in the declaration."

BY THE COURT, the Judgment was AFFIRMED.

Decided,  
April 20th,  
1819.

## Deford against Hayes.

1. Under what circumstances a continuance ought to be granted, on the ground of the absence of witnesses; without positive proof, that the subpoenas were delivered to the Sheriff of the County, or sent to the Sheriff of any other County.

See  
*Deans v. Scriba*, 2 Call 415;  
*Hook v. Nanny*, 4 H. & M. 157;  
*Syme and others v. Montague*, 4 H. & M. 180; *Ross v. Norvell*, 3 Munf. 170;  
*Milstead v. Redman*, 3 Munf. 219;  
*Higginbotham v. Chamberlayne*, 4 Munf. 347.

WHEN this cause (being an action of *assumpsit*) was called for trial in the Superior Court of Prince George county, the plaintiff by Counsel moved the Court for a continuance, upon the following grounds. One of the Counsel made oath, that he believed the plaintiff to be a resident of the town of Portsmouth in this State; that he had received letters from him dated there, and addressed him there; that, on account of the distance at which he resided from the Court, the Counsel had promised to have the Witnesses, one residing in Petersburg and the other at City Point in Prince George County, regularly subpoenaed for him; that, in performance of that promise, he gave a written memorandum to the Clerk of the Court to issue Subpoenas to the Sheriff for *Josiah Thomas*, and to the Serjeant of Petersburg for *James G. Chalmers*; that he had twice seen the said *Thomas* attending the Court as a witness, when the cause was not called; and, from a conversation between them, considered him a material witness, and indeed regarded his evidence as sufficient to sustain this action; that, in July last, when a special term of the Court was to have been holden, but was not, the said *Thomas* informed the said Counsel of his probable removal to Norfolk or Hampton; and that the said Counsel gave him a blank subpoena, which he, the witness, promised to have executed if he did remove; a fact of which the Counsel was yet ignorant—that, on the morning appointed for the trial, the said Counsel was informed, for the first time, that the other witness, (who was stated by the plaintiff to be the most material,) had removed from Petersburg to Tennessee; and that he knew of no other witness in Peters-

burg, who could prove the claim; and had had no communication with the plaintiff since July last. The Clerk of the Court also deposed, that it was his general rule to deliver subpoenas, &c., to the Sheriff and Serjeant, or to leave them at a store in Petersburg, where the Sheriff frequently called, and requested them to be left; and, therefore, without any particular recollection of this case, he believed the subpoenas to have issued accordingly. The Sheriff also stated that said *Thomas* had removed from City Point.

But, there being no proof of the receipt of the Subpoenas by the Sheriff of Prince George, or of any having been directed to the Sheriff of any other County, the Court refused to continue the cause:—to which opinion the plaintiff excepted.

Verdict, & Judgment for the defendant. The plaintiff appealed.

BY THIS COURT, the Judgment was reversed, and a new trial awarded.

APRIL,  
1819.

Deford  
v.  
Hayes.

### Brown against Ross.

Decided,  
April 22d.  
1819.

AN action of *assumpsit* was brought by *James Brown, jr.* against *David R. Ross* in the Hustings Court of the City of Richmond; the plaintiff in his declaration stating that the defendant, for value received, assigned him a note of a certain *J. W. Ryan*, negotiable at the Bank of Virginia; and that he could not recover the amount thereof from the said *Ryan*, who, before the money became due and payable, was *totally and notoriously insolvent*, and unable to pay the same, or any part thereof; by reason of which premises, and by the law of the land, the defendant became bound to pay to the plaintiff the amount of said note, with all interest due thereon.

1. It is generally necessary for the assignee of a promissory note to sue the drawer, in order to charge the indorser: but to this rule there are exceptions; where the plaintiff can shew a discharge of the drawer under the for-

mer bankrupt laws of the United States, or the insolvent law of this State, or that the drawer was *actually insolvent*, so that a suit would have been wholly unavailable. See *Lee v. Love & Co.*, 1 Call 497; and *Saunders v. Marshall*, 4 H. & M. 455.

APRIL,  
1819.

Brown  
v.  
Ross.

At the trial, upon the plea of *non assumpsit*, the plaintiff introduced the note, and protest by a Notary Public; and also *Anderson Barrett*, a witness, who stated, that he held a note drawn by said *Ryan* for four hundred dollars, due about the same time with the note upon which this action was brought; and that he was unable to recover the same of said *Ryan*, who, in his opinion, was notoriously insolvent; that he was a merchant in Richmond, and had shut up his store, and stopped business, about the time the said note became due; and, farther, that, on application to *Ryan* for payment of his note to the witness, he referred him to *D. R. Ross* the defendant; that the said *Ross* admitted, that a consignment of tobacco had been made to him by said *Ryan*, to secure him as his endorser of sundry notes; and that, if the said consignment turned out well, he should be secure, and would pay the said note to *Barrett*; also *Frederick Pleasants*, a merchant, who stated that, in his opinion, the said *Ryan* was notoriously insolvent. And, this being all the evidence on the part of the plaintiff, the Counsel for the defendant moved the Court to instruct the Jury that, if the plaintiff, in support of this action, relied on the insolvency of the said *Ryan*, it was incumbent on him to prove that insolvency by the institution and prosecution of a suit on said note against the said *Ryan*, with a judicious course of execution thereon, which had failed of effect, or on which the amount of said note had not been made or recovered; or that the said *Ryan* had been, previously to the time when said note became due, discharged under the Bankrupt Laws of the United States, or proved to be insolvent under the Act of the Virginia Assembly for the relief of insolvent debtors. The Court instructed the Jury accordingly; to which opinion the plaintiff excepted. Upon this instruction, a Verdict was found, and Judgment entered, for the defendant; which, upon an appeal, was affirmed by the Superior Court; whereupon, the plaintiff appealed to this Court.

Judge ROANE delivered the Court's Opinion, as follows:—

In the case of the assignment of a note, it is generally necessary for the assignee to sue the drawer, in order to charge the indorser. There are exceptions, however, from this rule; two of which are those stated in the opinion of the Hustings Court;—viz. a discharge under the former bankrupt laws, or the insolvent law of this State. But these are not the only exceptions. Another exists, whenever the plaintiff can shew to the jury that the drawer is in fact insolvent, whereby a suit would have been wholly unavailing. In this case, like the others, the undertaking of the assignee to use due diligence to recover the money from the drawer, is not infringed by the omission to sue: and this omission, if objected, may be always answered, on the part of the assignee, by shewing that a suit would have been fruitless on account of the actual insolvency of the drawer.

The opinion of the Court in this case prevented the appellant from shewing this insolvency, and limited the enquiries of the Jury to the two cases therein stated; whereby the appellant may have been injured. Both judgments are therefore reversed, and a new trial awarded, in which the instruction in question is not to be repeated, but one given in pursuance of this opinion, if required.

Judge BROOKE concurs in this opinion.

APRIL,  
1819.

Brown  
v.  
Ross.

Decided,  
Oct. 11th,  
1819.

## Pate against Spotts.

1. If, to a declaration in debt on a bond for making a title to a tract of land, the defendant plead "Covenant performed," and a verdict and judgment be rendered, (as in Covenant,) for damages for non performance; saying nothing of the penalty of the bond; such judgment ought not to be reversed at the instance of the defendant; for such irregularity can not be injurious to him; because the true ground of the action appears by the declaration, and the satisfaction thereby demanded extending to the whole injury, the action can in no form be repeated.

ON the 10th day of July 1804, a *Capias ad respondendum* in Covenant, was issued, from the Clerk's office of the former District Court holden at the Sweet Springs, in behalf of George Spotts against John Pate. This Writ being returned executed, (1.) a declaration for Covenant broken, was filed in October 1805; but, afterwards, leave being given to amend the declaration, another was filed, in debt on a bond with collateral condition. The defendant pleaded, "that he hath not broken his Covenant in manner and form as the plaintiff against him hath complained, and of this he puts himself upon the Country; and the plaintiff likewise." On motion, he was afterwards permitted to withdraw that plea, and plead anew; whereupon, he pleaded, "that the plaintiff ought not to have and maintain his action aforesaid, because he saith he hath performed the Covenant according to the form and effect of his Covenant, and this he is ready to verify; to which plea the plaintiff replied generally."

On the trial of the issue thus joined, which took place before the Superior Court of Botetourt, the plaintiff, to support his action, offered as evidence to the Jury a Bond, dated the 13th of July 1797, in the penal sum of one thousand pounds, with a condition for making to the plaintiff a title to a tract of land therein described, "whenever he the said John Pate should be thereunto lawfully required; if the defendant plead covenant performed, and issue be joined thereupon, the plaintiff is not bound to prove on his part any demand of a deed.

(1.) Note. Oyer was not prayed of the Writ.

2. In debt on a bond conditioned that the obligor shall make a title to a tract of land, when thereunto lawfully required; if the defendant plead covenant performed, and issue be joined thereupon, the plaintiff is not bound to prove on his part any demand of a deed.

3. If the writ be in Covenant, and the declaration in debt, to which the defendant plead Covenant performed; the Writ (though not made part of the record by Oyer) may be resorted to, at the trial, to shew the true date of the institution of the suit, and the Court may instruct the Jury that a deed executed after the date of the Writ, (though before the filing of the declaration,) is no performance of the condition of the bond declared upon.

OCTOBER,  
1819.

Pate  
v.  
Spotts.

“fully required;” which bond did not vary from that described in the declaration. The same being read, the defendant moved the Court to instruct the Jury, that the plaintiff, to maintain an action on the said writing obligatory, must prove a *demand* made, of the defendant, for the deed, title, or conveyance therein covenanted to be made, before the suing out of the original writ in this cause; but the Court refused to give the instruction, and stated to the Jury that the service of the original Writ was a *sufficient demand*; and the *subsequent execution* by the defendant of a deed, (set forth in *hæc verba*, duly recorded upon the defendant’s acknowledgment in Court, and bearing date the 21st of May 1805,) was not a performance of the condition of the writing obligatory declared upon; and that no other demand was necessary to entitle the plaintiff to maintain his action:—to which opinion of the Court the defendant excepted.

The Jury found a verdict, “that the defendant hath  
“not performed the Covenant in the declaration mentioned, but hath broken the same in manner and form  
“as the plaintiff against him hath complained; and assessed the plaintiff’s damage by occasion thereof to 400*l*.  
“with lawful interest thereon, from the 10th of July  
“1804, until payment, besides his Costs:”—and Judgment was entered accordingly.

The defendant applied for, and obtained, a Writ of Supersedeas to this Judgment; assigning in his petition the following reasons:—1st, because the Writ, plea and Judgment are all in *Covenant*, and the Declaration is in *debt*; and the Judgment being only for *damages*, as in *Covenant*, and not for the *penalty* under the act of Assembly in that case made and provided, it is no bar to another action for another alleged breach, on which *damages* may be recovered beyond the penalty:—2d, because the plea was no direct answer to the *declaration*, and only proper to an action of *Covenant*, which was the action brought; and no issue was made up:—3d, because the opinion given by the Judge was *erroneous* and *contradictory*:—*erroneous*, in stating that the plaintiff, in order



OCTOBER,  
1819.

Pate

▼

Spotts.

to maintain an action on the writing obligatory in the declaration mentioned, need not prove a demand of a Conveyance, although, by the express terms of the condition of the said writing obligatory, the conveyance was to be made when lawfully demanded; and *contradictory*, in stating that the *bringing the suit was a demand*, and yet that a conveyance, *made after and upon such a demand*, was no performance. "The said opinion was also "erroneous in this, that it stated that the conveyance offered in evidence was no performance; which opinion, "if it involved the question whether the *land passed by a Deed*, was a question of *fact*, which ought to have "been left to the *Jury*;(2) and, if it related to the *date of the deed*, as being *posterior* to the suing out the *Writ*, "was not correctly given, as it is stated, in *general terms*, that "*it was not a performance, &c.*" It was "also erroneous in another respect; as, the *Writ being in Covenant*, and the *Declaration in Debt*, the action is "only sustainable by disregarding the *Writ*, and considering the *Declaration* as the beginning of a new and "separate action; in which case, the Conveyance, which "bore date *before the filing of the declaration*, must be "considered as a performance before the bringing of "that suit."

*Wickham* for the plaintiff in error.

*Leigh, contra.*

Judge ROANE pronounced the Court's opinion.

Considered as an action of *Covenant*, the judgment in this case is unexceptionable in it's form; and, considered as an action of *debt*, although the judgment, in that case, should have been for the penalty, to be discharged by the sum found by the *Jury*, yet this irregularity is *not injurious* to the appellant, and therefore affords no ground to reverse the judgment. It is not injurious, because, being an action, (as appears by the declaration,) for a failure to make a title to a tract of land, this remedy extends to the *whole injury*, and the action can in no form be repeated.

(2) Note. See *Herbert v. Wise*, 3 Call 242.

On the merits, the Court is further of opinion, that *no proof of a demand of a Deed was necessary to be given, upon the issue joined in this cause; and that, if the Deed, stated in the instruction to have been made, is unexceptionable in other respects, it is a radical objection to it that it appears by the bill of exceptions to have been made after the institution of the suit.*

Judgment affirmed.

Oceanus,  
1819.

Pate  
v.  
Spotts.

## Thomson and O'Neal against Evans.

Dismissed,  
Oct. 12th,  
1819.

IN this case, an appeal being taken from a Judgment of the Superior Court of Monongalia County, it was granted by that Court, "upon the appellant's entering into bond with good security conditioned as the law directs, in the Clerk's Office, within thirty days," which bond was accordingly given; but this Court dismissed the appeal, on the ground that the bond, being given not in open Court but in the Clerk's Office, was illegal.

1. Where an appeal is taken in Court, the appeal bond can not legally be given in the Clerk's office.

## Singleton against Lewis and others.

Decided,  
Oct. 13th,  
1819.

UPON an appeal from a Decree of the Superior Court of Chancery for the Fredericksburg District, dismissing a Bill exhibited by the appellant against the appellees.

The objects of the Bill were, 1st, that the complainant's possession of a tract of land, founded on an equitable title to a lease for lives, (still existing) might be quieted during those lives; 2d., that the defendants

dissolution, under the 3d. sect. of the Act of January 20th, 1804, if such Bill have other objects besides those embraced by the Injunction. See Edit. of 1808, c. 29. § 3. p. 29; R. Code of 1819, c. 66. § 60, Vol. 1st. p. 308.

1. A point similar to that in Hough v. Shreve, 4 Munf. 490; again decided; viz.; that a Bill of Injunction ought not to be dismissed at the next term after

OCTOBER,  
1819.

Singleton

v.

Lewis and  
others.

should be compelled to interplead, for the purpose of settling their conflicting claims to the rent; and the plaintiff be permitted to bring into Court the amount thereof, to be delivered over to the person entitled; 3d, that the defendant so entitled, should be compelled to execute a formal and legal lease to the plaintiff, for the lives specified; and, lastly, that the defendants be each of them restrained from farther proceedings to recover the rent, and from ejecting the plaintiff, during the remnant of the lives of his lease, until they should interplead, and have their rival claims settled.

On this Bill, an injunction was awarded in November 1816, and dissolved in April 1817.—And on the 1st. of October 1817, when the cause had not been set for hearing, the bill was dismissed, by virtue (as Chancellor NELSON understood the law,) of the 3d, section of the Act of January 20th, 1804.

BY THIS COURT. The Decree was reversed, and the cause remanded; “the Bill being improperly dismissed under the Act of January 20th, 1804, it having “other objects exclusive of those embraced by the injunction.”

Decided,  
Oct. 14th,  
1819.

### Sutton against Gatewood and Wife.

1. When a demurrer to a Bill in Chancery is overruled, a decree ought not to be pronounced against the defendant, but leave should be given him to file an answer.

THIS was a suit transferred (under the Act of Assembly of January 20th, 1814,) from the Superior Court of Chancery at Richmond to the Fredericksburg District, after the Bill had been taken for confessed, and a report of a Commissioner upon the accounts between the parties had been returned; in which report, *Sutton* the only defendant, was charged (among other items)

2. A demurrer to a Bill in Chancery, against a *Guardian* for advances of money &c. by the plaintiff for the use of the *Ward*, ought not to be sustained on the ground that the *Ward* ought to have been a party:—but if, upon the answer of the guardian, it should appear proper, the Court should then direct the *Ward* to be made a party.

with the board, and sundry advances for the benefit, of several children, his wards, who, it was alledged in the Bill, were supported by the plaintiffs.

OCTOBER,  
1812.

Sutton  
v.  
Gatewood  
and Wife.

In April 1816, on the defendant's motion, the order of February 1st, 1812, taking the bill for confessed, was set aside, and leave granted him to file a demurrer *for the want of proper parties*; on the ground that, since his wards were the persons principally interested in the suit, they ought to have been made parties defendant to the Bill:—but, upon argument, the Chancellor overruled the demurrer, and decreed against the defendant, conformably to the report:—from which decree he appealed.

It was the opinion of this Court, that the Decree was erroneous, in not reserving liberty to the appellant, on overruling the demurrer, to file his *answer*. It was therefore reversed, and the cause remanded for that purpose, with a direction that *if, on the coming in of the said Answer, it should appear proper*, the Wards of the appellant should be made parties to the suit.

## Horton and others against Haymond and others.

Decided,  
Oct. 15th,  
1819.

A Bond was executed on the       day of May 1804, by *Elihu Horton, Thomas R. Chipps, William G. Payne* and *James Pindall* to "*Calder Haymond &c. overseers of the poor for Monongalia County,*" in the sum of one thousand dollars, with a condition that, "if the above bound *Elihu Horton and Thomas R. Chipps* should well and truly collect, from the Tithables of Monongalia County, the poor rate for the year       , and pay the       obligors shall well and truly collect, from the Tithables of said County, the poor rate for the year       , and pay the same to the orders of the said overseers, then the said obligation is to be void," &c.?

2. An action against a Collector of poor rates, upon his bond to the Overseers of the Poor, can not be maintained, without an averment in the declaration that the plaintiffs are Overseers at the time of the institution of the suit.

OCTOBER,  
1819.

Horton and  
others  
v.

Haymond &  
others.

“ same to the orders of the said overseers, then the said  
“ obligation was to be void,” &c.

In the year 1810, an action of debt was instituted upon this Bond, by *Calder Haymond, Nicholas Vandevort,* and others, in the Superior Court of Monongalia County; stating in their declaration that they, *on the 21st day of May 1804, and long before and after,* were overseers of the poor for the said County of Monongalia, and that the bond was *given to them as such,* on the said 21st of May; but not stating that they were overseers of the poor *at the time of the institution of this suit.*

The defendants, after craving *oyer*, pleaded, 1st, *Covenants performed*; 2d, that a Judgment was rendered in their favour, on a *motion* made on the same bond; which Judgment had never been reversed. Issue was joined on the first plea; and to the second, a general demurrer, which, on argument was overruled by the Court. A verdict being found for the plaintiffs upon the first plea, the defendants filed errors in arrest of judgment, which were over-ruled, and final judgment given according to the verdict.

A Petition for a *Supersedeas*, set forth the following reasons for reversing the judgment:—1st, because the said bond, not being warranted by the common law, but taken solely under the Statute in that case made and provided, was void; the Act of Assembly not being pursued; as would appear on reference to the Act of 1792, Edit. of 1792, 1803, and 1814, c. 102, § 10. Vol. 1st, pa. 182:—2d, because, if the action were maintainable at *common law*, (which, under the authority of the case of *Stuart v. Lee*, 3 Call 421, and other decisions, it is not,) it certainly is not maintainable under the *Act*, in which way it is brought; the plaintiffs *suing as overseers*:—3d, because the judgment in favour of the defendants, on the *motion*, was a bar to the recovery in any other form of action; and, for this reason, whether the judgment on the *motion* was right or wrong, judgment should have been given in favour of the defendants, on the demurrer to the second plea.

A Judge of this Court granted the *Supersedeas*; and, after argument, by *Wickham* for the plaintiffs in error, and *Nicholas contra*, Judge ROANE pronounced the Court's opinion, as follows:—

OCTOBER,  
1819.

Horton and  
others

v.

Haymond &  
others.

The Court, *doubling*, (to say the least,) whether an action will lie on the bond in question, in favour of the Overseers of the poor or their successors, on account of certain defects existing in it, taken in reference to the requisitions of the Statute in such case provided, is of opinion that the present action can not be sustained; it not being averred in the declaration that the plaintiffs were overseers of the poor at the time of the institution of the suit; and, if not, the right of action existed in their successors, and not in them.

The Judgment is therefore to be reversed, and entered for the appellants.

## Smith (Lieutenant Governor,) against Cooper.

Decided,  
Oct 19th,  
1819.

IN the County Court of Wythe, an action of debt, upon a *Constable's* bond, was brought in the name of *George W. Smith*, Lieutenant Governor exercising the office of Governor, successor of *James Monroe*, who was successor of *John Tyler*, who was successor of *William H. Cabell*, (for the benefit of *William Hay*,) against *William Cooper* and *George Cregar*, who executed the bond together with a certain *Edward Murphy*.

1. In declaring upon a bond given by a public officer to the Governor and his successors, conditioned for faithful performance of official duty, it is not necessary to

aver the non-payment of the penalty to the obligee, or his successors, by any of the obligors.

2. In a suit against a Constable for breach of duty, in not delivering to the Sheriff, in obedience to the Court's order, attached effects in his hands, testimony on his part to prove that any of those effects were not the property of the person against whom the attachment issued, and, therefore, after being taken, were by him given up, is not admissible.

3. To such action, if the Constable plead, that the plaintiff in the attachment, having taken from a certain J. B. a bond for the delivery of the attached effects, afterwards directed him to give them up to the debtor, with which direction he complied; he can not introduce the said J. B. as a Witness to prove it.

OCTOBER,  
1819.

Smith (Lieutenant Governor)  
v.

Cooper.

The declaration was in the usual form of one upon a bond for the payment of a sum of money; saying nothing of a condition; but averring that the defendants *had not paid* the said sum, or any part thereof, &c.

The defendants prayed *Oyer* of the Bond, which thereupon was set forth in the Record, and appeared to have been given to secure the faithful performance of the duties of the office of Constable, to which the said *William Cooper* was appointed. They then pleaded "*condition, performed,*" and the plaintiff, by a replication, set forth a breach as follows;—viz. "that the said *Cooper* "was a Constable, as stated in the defendant's plea; and "that the said *William Hay*, for whose benefit this suit "is brought, had obtained from *John Montgomery*, a Justice of the Peace for the said County, on the 6th day of "March 1810, an attachment returnable to the next "Court thereof, for rent which would become due on the "1st day of May 1810, against the estate of a certain "*John Robertson*; which said attachment was put into "the hands of the said *William Cooper* to execute; and "the said *Cooper*, within the District of which he was "Constable, did execute the same on property belonging "to said *Robertson*, and did make return on said attachment, that he had levied the same on the property of the "said *John Robertson*; to wit; (here the articles were "specified;) and made his return thereof to the next "Court of the County of Wythe, when, on a hearing of "both parties, the said Court rendered a Judgment in "favour of the said *William Hay* against the said *John Robertson*, for the sum of \$31 22 cents, and costs, and, "by their order of condemnation, directed the said property, so attached, to be sold by the Sheriff of said "County by public auction, for money, &c.; which order "of sale was issued, and legally put into the hands of "*Elijah Sayers* a Deputy Sheriff for the said County, "duly authorised to receive the same and to make sale "of the said property: and the said *Elijah Sayers*, as "Deputy Sheriff, did, according to the direction of the "said order of sale, duly and legally advertize the said "property for sale; and demanded the same of the said

OCTOBER,  
1819.

Smith (Lieut.  
tenant Go-  
vernor)  
v.  
Cooper.

“ *William Cooper*, as by law he had a right to do; and  
“ the said *Cooper* did, then and there, contrary to his  
“ duty as a Constable, fail and refuse to deliver the said  
“ property or any part thereof, so by him attached as the  
“ property of the said *John Robertson*, to the said Deputy  
“ Sheriff, but on the contrary, hath wholly and altogether  
“ kept the said property out of the hands of the said De-  
“ puty Sheriff, and still keepeth the same, whereby the  
“ said *William Hay* hath been kept out of the benefit of  
“ his said judgment, and hath lost his said debt; and this  
“ he is ready to verify; wherefore he prays judgment  
“ whether the said plaintiff ought to be barred from hav-  
“ ing and maintaining his said action.”

The defendants filed a special rejoinder, “ that, by vir-  
“ tue of the said warrant of attachment, mentioned in the  
“ plaintiff’s replication, he the said *William Cooper* le-  
“ vied the same on the property therein also mentioned,  
“ and took the said property into his possession, where it  
“ remained, subject to the direction of the law, until the  
“ day of                      , when the said *William Hay*,  
“ having taken from a certain *John Baber* a bond for the  
“ delivery of the said property to the said *Cooper* on the  
“ 1st day of May 1810, gave the said defendant *William*  
“ *Cooper* directions to give up and deliver to the said  
“ *John Robertson* the said property, so as aforesaid taken  
“ by the said *Cooper*; by virtue of which directions, the  
“ defendant delivered then and there the said property  
“ to the said *John Robertson*; without that, &c.; and this  
“ they are ready to verify, &c.”

The plaintiff filed a general sur-rejoinder.

At the trial, the defendants introduced *John P. Nye*, a  
witness, to prove that a stove, mentioned in the said  
*Cooper’s* return, and also in the plaintiff’s replication,  
was the property of *John Johnston*, to whom (after it was  
taken by the Constable on said attachment,) it was re-  
turned by the said *Cooper*; to the introduction of which  
evidence the plaintiff objected; and the Court, sustaining  
the objection, refused to permit the witness to be examin-  
ed; to which opinion the defendants excepted.



Ocoosa,  
1819.

Smith (Lieutenant Governor)  
v.  
Cooper.

The defendants also offered to introduce *John Baber*, as a witness, to prove the facts stated in their rejoinder; but the plaintiff contended that he was an interested witness, in as much as he became liable to *Cooper*, should *Cooper* lose the present action by not having the property forthcoming. The Court sustained the objection, and refused to permit the witness to be examined; considering him interested in the present controversy, because he had given the bond mentioned in the rejoinder; though no other evidence of his interest appeared; whereupon, the defendants again excepted.

The plaintiff demurred to the evidence offered by the defendants; and, in the demurrer, the testimony adduced on both sides, was stated; consisting, on the part of the defendants, of, 1st, the bond taken from *Baber*; (admitted to be in the hand-writing of *William Hay* the relator;) 2d, the attachment and return, with the order condemning the attached effects, and directing the Sheriff to sell them; on which order, the following return was made, "*No property delivered,*" *Elijah Sayers D. S. for St. Boyd, S. W. C.*" The plaintiff introduced *Elijah Sayers*, who stated, "that he was Deputy Sheriff for Wythe County; that an order of sale came into his hands from the Court thereof, directing the sale of the property attached and condemned as aforesaid; that he advertised it for sale, and, on the day of sale, saw the defendant *Cooper*, whom he requested to deliver to the Sheriff the property:—*Cooper* said, *they* (meaning, as the witness understood, *Robertson*) *had made away with it*:—the said *Cooper* also stated, at the same time, that *William Hay* (the Relator) had directed him to take a bond for the delivery of the property:—some short time thereafter, on the same day, he saw the said *Robertson*, and *Baber* the proposed witness, with whom he had some conversation: he shortly thereafter again saw *Cooper*, whom the witness told that *Robertson* and *Baber* had been looking for him, *Cooper*, to deliver the property, etc. which *Cooper* went away, saying something which the witness had forgot." And this was all the evidence in the cause.

The Jury found a verdict for the plaintiff, for the debt in the declaration mentioned, to be discharged by \$44 83 cents damages; subject to the opinion of the Court on the demurrer. The Court entered judgment for the plaintiff; to which a *Supersedeas* was granted by the Superior Court; and the judgment was reversed; "there being no averment in the declaration that the money claimed by the defendant in error against the plaintiffs, on the bond on which this action was founded, had not been paid, or any part thereof, by *Edward Murphy* one of the Co-obligors therein; and there also being no averment that the penalty of the same, or any part thereof, had not been paid to the predecessors of the plaintiff, or any of them, acting as Governors of this Commonwealth." And that Court, proceeding, &c., ordered judgment to be entered, that the defendant in error take nothing, &c.:—from which he appealed to this Court.

OCTOBER,  
1819.  
SMITH (Lieutenant Governor)  
v.  
COOPER.

After argument by *Wickham* for the appellant;—no Counsel appearing for the appellees;—Judge ROANE pronounced the Court's opinion as follows:—

The Court is of opinion, that the judgment of the Superior Court is erroneous in this, that the bond in the proceedings mentioned is not a bond for the payment of money only, but a bond for the performance of conditions; and in this, that, it being a public bond for the benefit of others, neither the obligee, the Governor, nor his successors, were competent to receive any money under the provisions thereof; and that therefore it was not necessary to aver the non payment thereof to him or them, in the declaration.

The Court is also of opinion, that the judgment of the County Court is erroneous in not reserving to the plaintiff and others a right to sue out a *scire facias* according to the provisions of the Statute. (1)

And this Court proceeding &c., both judgments are reversed, with costs to the appellant as the party substantially prevailing.

(1) Note. See *Bibb v. Cauthorne*, 1 Wash. 91, 92.

Decided,  
Oct. 25th,  
1819.

## Zane's devisees against Zane.

1. In the year 1775, *J. Z.* made a settlement on the upper part of an island in the Ohio River, containing in all 285 acres. In 1777, his brother *E. Z.* made a settlement on the lower part. A *parol* agreement between them, in or before the year 1784, that *E. Z.* should exhibit his settlement right, to the Land Commissioners, obtain their certificate, and get a Patent to himself for the whole island; and afterwards convey to *J. Z.* in fee simple his part thereof, situate above certain line trees, was enforced in Equity, upon a Bill filed, in 1815, by *J. Z.*, whose possession of the land had continued without interruption from the time of his first settlement.

IN a suit brought by *Jonathan Zane* in the year 1815, against the heirs at law of *Ebenezer Zane* deceased, in the Superior Court of Chancery for the Clarksburg District, Chancellor *CARR* pronounced the following Opinion and Decree.

"The Bill states that, in the first settlement of the Western Country, the plaintiff took up, in conjunction with his brother *Ebenezer*, the island in the Ohio River, called Wheeling Island: that they took possession of their respective parts, and occupied them 'till the death of his said brother, and the plaintiff has continued to occupy his part ever since: that, in 1784, they employed the Surveyor of Ohio County, (in which the land lies,) to survey the island for them: that he did this, distinctly establishing, in the presence of himself and brother, and by their direction, an Elm Tree on the East side, and a Walnut on the West, as Corner Trees; from the one to the other of which, a strait line was to constitute their division line; the upper part to belong to the plaintiff, the lower to his brother: that the plaintiff's part was calculated separately by the Surveyor, and found to contain 75 acres 138 perches: that it was then mentioned by his brother, that he had a settlement right, which would cover the whole island; that a patent might issue in his name for the whole, and he would convey to the plaintiff his part; which was assented to by the plaintiff; that, after the land was patented, he suggested to his brother the propriety of making a deed for his part, which he promised to do; but the confidence and regard they felt

2. The considerations of *compromising doubtful rights*, and *settling boundaries*, are not only good, but favoured in law.

3. Although the rule is, that the *allegata* and *probata* ought to correspond, yet the Court of Equity should always incline to get over *form* in favour of *substance*, where the case in *proof* is clearly such as would, if properly set forth in the Bill, entitle the plaintiff to a decree; especially, if the defendants do not pretend to disprove the agreement alledged, or to prove one different but say in their answer that they are willing to yield to the proof of any agreement which the plaintiff can establish.

OCTOBER,  
1819.Zane's devisees  
v.  
Zane.

for each other rendered them careless on the subject, and it was delayed from year to year, 'till his brother died without executing the deed: that his brother often declared, before witnesses, that the upper part of the island was the plaintiff's, and, if he died before executing a deed, his children were directed to do so: that, so far from carrying into execution this intention of their father, the children, or some of them, are prosecuting an action at law to turn the plaintiff out of possession. All the children by name are made parties; and the prayer of the Bill is that they may be compelled to convey his part of the island to the plaintiff. The Bill was subsequently dismissed as to all the children, but *Noah* and *Daniel*.—*Noah* filed his Answer; and, in this state, the papers were put into my hands before the last term. I returned them, saying I could not decide without the answer of *Daniel*, to whom, with *Noah*, it appeared from *Noah's* answer that the Island had been devised by *Ebenezer*. I mentioned at the same time, that I should like to see the Patent to *Ebenezer*, and his Will. At the last term it was agreed by Counsel, and entered of record, that the Answer of *Noah* should be taken as the answer of *Daniel* also; that all the depositions in the cause should be read as to *Daniel*, and that the cause should be considered as set for hearing. Accordingly, the papers were again put into my hands; but the Patent, or the Will of *Ebenezer*, have not been furnished. I do not know that they are absolutely necessary to a decision, as their existence and contents, so far as concerns this cause, seem to be admitted on all hands. The answer states, that the defendants *Noah* and *Daniel* are devisees, under their father's will, of the island; that they know nothing of the contract stated in the Bill, but have heard their father say that he had promised the plaintiff that he should during his life hold that part of the island, which lay opposite to his land on the main. The answer then refers to several copies of original entries and surveys; states that *Ebenezer* was invested with the legal title, and died seised; admits the plaintiff entitled to a life estate; alleges that, until their father's death, the whole island was taxed to

Ooreman,  
1819.

Zane's de-  
vises  
v.  
Zane.

him, that the defendants are prosecuting at law a writ of Right to recover the part of the island in the plaintiff's possession, and hope to succeed, unless the plaintiff can shew the equitable claim he pretends to, and of which the defendants are ignorant: that the defendant *Noah*, upon hearing his uncle claimed the land, wrote to him, enquiring by what right he claimed, and stating that, if there existed any arrangement or agreement, by which his father was morally bound, he would execute it; to which he received no answer: that *Ebenexer's* certificate of settlement, covering the whole Island, would give him a title to the whole, unless the plaintiff could derive a title to part from some contract; and the defendants are perfectly and entirely willing to yield to the proof of such contract, if any such there be. This is an abstract of the answer. It will be observed, that it does not contradict the Bill, but, merely professing ignorance of the subject, puts the plaintiff on the proof of his case; to which proof, if any can be produced, they are entirely willing to yield.

In support of his claim, the plaintiff produces, first, his long and uninterrupted possession, without the payment of rent, or any other evidence that he held it as the land of another: 2dly, the deposition of *Mills*, who says, that in 1775 he saw an improvement on that part of the Island claimed by the plaintiff, consisting of trees deadened and brush heaps made, which he understood were made by the plaintiff, who then lived where he now does, on the main, opposite the island:—3dly, the deposition of *Mrs. Clarke*, who says that, about the time of *Broadhead's* campaign, her husband moved on the island; that he applied to *Ebenexer* to lease him some land, who said he had leased all the land he had to spare; but referred him to the plaintiff; that the plaintiff gave her husband a lease of the upper part of the island, where she has ever since resided; that *Ebenexer* never mentioned to her his claim to that part of the island, or claimed rent, or ordered her off the premises; that her husband has been dead about twenty years; since which time, she has lived on the land, without paying any certain rent, but has cooked

for the plaintiff's hands, and taken care of his stock and farm, as a compensation for living on the land:—4thly, the deposition of *John Caldwell*, who says, that, in 1779, he was agent for his father *James Caldwell*, in land business, in the western parts of Virginia; that his father claimed land immediately below Wheeling Creek on the Eastern shore of the Ohio; *Ebenexer* directly above him; and the plaintiff next above *Ebenexer*; all of which lands lay opposite to different parts of Wheeling Island:—that, after a time, a dispute arose between *Ebenexer* and the Deponent, in respect to their claims on the Island; which was amicably adjusted, by agreeing that each should retain so much of the Island as lay opposite to his land; that, some time in the Spring of 1782, the deponent was in company with *Ebenexer*, at the sitting of the board of Commissioners in Monongalia County, when *Ebenexer* proposed to the deponent to agree that he should include the whole Island in his certificate of settlement and take a patent for the same, and that he could make a deed to *James Caldwell* for his part: that, at the same time, *Ebenexer* mentioned to the deponent, that he had made such a proposal to *Jonathan*, who had agreed to it; and that each of the owners could pay an equal share of the expense, which would save costs: that the deponent would not make such agreement; and, sometime after, *Ebenexer* bought *James Caldwell*'s part of the Island, which lay opposite his land below Wheeling Creek:—5thly, the plaintiff produces the deposition of the surveyor *Woods*, who says that, in 1784, he surveyed a tract of land on Wheeling Island, by virtue of a certificate from the land Commissioners, in the name of *Ebenexer*; that, while surveying the same, *Ebenexer* and *Jonathan*, (both present,) pointed out an Elm tree on the east side of the Island, and a Walnut on the West side, which they told the deponent to mark, for corner trees, to divide the said Island between them; which trees were marked for corner trees, and the deponent took an account of them in his field notes; the said *Ebenexer* saying that, as soon as a patent was obtained on the survey, he would convey that part above the said corners to *Jonathan*; that he has

OCTOBER,  
1819.

Zane's devi-  
sons  
v.  
Zane.

Oswegan,  
1819.

Zane's de-  
posit  
v.  
Zane.

the original field notes in his possession yet; (a Copy of which is filed among the papers, and admitted by the Counsel;) and, upon examination, finds that the Elm on the East side of the Island is described as standing 182 poles from the upper end, and the Walnut on the West side as standing 174 poles from the upper end:—the course across the upper end of the Island, is 17 poles at the Elm on the East side. The deponent recollects that *Ebenexer* said that his settlement right was enough to cover the whole Island, and that taking the whole up together would save *Jonathan* the costs of a warrant and separate survey. Lastly, the plaintiff produces the evidence of *Moses Given*, who says that he was with *Ebenexer* in his last illness, when he was on his death-bed; and, in a conversation he held with him, *Ebenexer* said that he intended the upper part of the Island for *Jonathan*. The deponent asked him why he did not see to it in his own day? he said, he had children he could rely on. The reason of the deponent's enquiry was, that he had previously understood, from common report, that the whole Island belonged to *Ebenexer*.

Upon this evidence, the plaintiff rests to establish his claim; and I must confess, that, to my mind, it is extremely strong to prove that he had, by settlement or improvement, a right to the upper part of the Island; that, under this right, he was in possession; that *Ebenexer* and himself did make an agreement, (the proposition coming from *Ebenexer*,) that he (*Ebenexer*) should obtain from the Commissioners a settlement right, which would cover *Jonathan's* part of the Island, and should convey to *Jonathan* when he obtained the patent: that, in consequence of this agreement, *Jonathan* made no claim before the Land Commissioners:—that the conversation, which passed before the Surveyor *Woods*, was an explicit recognition of this agreement; and that the evidence of *Given* shews that, on his death bed, *Ebenexer* still acknowledged it.

To countervail this evidence, what have the defendants produced? 1st, the declarations of *Ebenexer* and his wife that *Jonathan* was to have a life-estate only; or, at most,

for himself and wife. These declarations I hold to be utterly inadmissible in favour of the party making them.

No man is permitted by his own evidence to make out his own case. 2d, The general understanding of the neighbourhood, that *Jonathan* had a life estate, and *Ebenezer* the fee simple. This sort of evidence upon the subject of *title*, is of little more worth than the last; probably produced by it, and by the farther circumstance of *Ebenezer's* having the *patent*, of which every one might know, though few would hear perhaps of the *parol* agreement. 3d, The payment of taxes by *Ebenezer*; of taxes for the *whole* Island tract. This probably resulted, too, from the legal title being in him. The Commissioners for the County, finding that to be the fact, listed the land to him; and the tax on *Jonathan's* part, being but a trifle, excited no attention. This, at least, is probable:—but, whether true or not, the circumstance can by no means avail to prove, in the face of *Jonathan's possession*, that he had abandoned his claim.

Thus, if the case depended merely upon the evidence for and against the agreement, I should feel little hesitation in the decision to be given: but, in the arguments which have been submitted by the Counsel for the defendants, several objections have been taken to the plaintiff's case, which I will proceed to consider. 1st, The Statute of frauds. 2d, That the agreement was without consideration. 3d, That the length of time which has elapsed should prevent the Court from interfering. 4th, That the case made out in the evidence is materially variant from that stated in the Bill; and, however good in itself, will not justify a recovery, as the plaintiff must make out the case stated and put in issue.

With respect to the *Statute of Frauds*, it is perhaps hardly worth while to say any thing; as one of the Counsel abandoned that ground, and the other I am sure would have done so, if he had adverted to dates; the Act having passed in 1785, and the contract here having been made long before that time. I will merely quote Judge ROANE's remark in *Fauce v. Walker*, on the subject. That, like this, was a contract for land. He says, "If it be said

GEROAM,  
1819.

Zane's devi-  
sons  
v.  
Zank



OORONEX,  
1819.

Zane's de-  
vises  
v.  
Zane.

“that a reliance on the parol proofs in this case is dan-  
“gerous; I answer, that the Act of frauds does not ap-  
“ply to the two points of time embraced by them, and  
“that it was not for Courts, but the Legislature, to  
“adopt the rules of that Statute: independent of it, we  
“must decide this case, as others, by the general doc-  
“trines of evidence.”

2dly, That the agreement was *without consideration*. This objection is founded on the idea, that the agreement was, for the first time, proposed and made while the survey was going on, and when *Ebenexer*, being in possession of the certificate of settlement, had a right under it to cover the whole Island: but it is most evident to me, both from the deposition of *Woods* and of *Caldwell*, that what passed at the survey was merely the recognition and recapitulation of an agreement formerly made. *Caldwell* states, that, when about to go before the Commissioners, *Ebenexer* proposed to him, “to agree  
“that he should include the whole Island in his certifi-  
“cate of settlement, and take a patent for the same, and  
“that he could make a Deed to *James Caldwell* for his  
“part;” saying, at the same time, “that he had made  
“the same proposal to *Jonathan*, who had agreed to it.” Here, then, is the agreement explicitly stated by the party himself. And was there not a good consideration for it? We have seen that *Jonathan* had made an improvement on the upper end of the Island in 1775: *Ebenexer*’s certificate states his settlement to have been in 1777: the Island contains but 285 acres: consequently, one Settlement Right would cover the whole. Who should obtain this? If there was a contest, might not the Commissioners award it to *Jonathan*? To prevent this contest then, and yet secure to the parties what each claimed, *Ebenexer* made the agreement. Here were two considerations, not only good, but favoured in law, to compromise doubtful rights, and to settle boundaries.

The 3d objection is, the *length of time* which has elapsed. It is correctly stated to be a general rule: that Courts of Equity, after a great length of time, will not lend their aid to execute contracts. The Rules of Courts

OCTOBER,  
1819.

Zane's de-  
vises  
v.  
Zane.

are generally founded in good reason; and Courts of *Equity*, especially, never tie themselves down so strictly to any rule as to apply it to cases not within the mischief it was intended to remedy. Let us enquire what are the reasons on which this rule is founded? 1st, It is considered, that, where a party has for a long time suffered a contract to sleep, without taking any step to execute it, the opposite party has a right to presume an abandonment, and, under this presumption, may have made arrangements and dispositions which would render a specific execution of the contract very injurious to him. Does this reasoning apply to the present case? Could *Ebenexer* ever have supposed that *Jonathan* had abandoned the contract? Let it be remembered that *Jonathan* did not claim the land under the contract, but by an *original right*; that, by a compromise of the claims of the brothers, *Ebenexer* was to receive the legal title to the whole Island, and, in consideration of the compromise, was to make a deed to *Jonathan* for his part; that, under the agreement, *Ebenexer* did obtain the settlement certificate, and the Patent. Here the consideration moving from *Jonathan* was complete: he had performed the whole of his part of the contract. After this, could it be supposed that he would abandon? Abandon what? The claim of the legal title from his brother, when this was all that remained to complete the contract? This would be, indeed, a strange abandonment! But *Jonathan* still held possession; uninterrupted possession. To what could this be referred, but to his claim? Will it be said that it might be referred to the estate for life which *Ebenexer* gave him? The answer is, that, of this estate for life, there is not a tittle of Evidence which can be received. The possession then which *Jonathan* held, can only be referred to his claim. Suppose a man were to buy an estate, to pay the consideration, to take possession and hold it uninterruptedly for many years, without having obtained a legal title. When, at length, he came to ask for the legal title, would it, under such circumstances, be said to him, "we can not aid you; you have abandoned your contract?"—Certainly not.

Owens,  
1819.

Zane's de-  
vises  
v.  
Zane.

But it may be said that *Jonathan* did not gain possession under the contract. True; because he was already in possession under his prior right. But was not that possession continued under the sanction of the contract, after *Ebenexer* obtained the legal title?—And was not what passed at the survey equal to a delivery of possession? *Jonathan* being then in possession, *Ebenexer* directed the corners to be marked, and the line laid down, which designated and circumscribed that possession, and says, that so soon as he obtained a patent, he would make *Jonathan* a deed for it. In my mind, this was equal to an actual delivery of possession.

Another reason, for which Courts of Equity have refused to execute contracts after a great lapse of time, is, that, in the interim, the circumstances may be forgotten, and the evidence lost which would present the subject fairly to the Court; and, as this has happened through the negligence of the party applying, he shall suffer by it. But, in the case before us, the injury from length of time could operate only to the prejudice of the plaintiff; for he had to make good his contract by witnesses; while *Ebenexer* stood firm on the ground of his patent. Every year that passed away, might bear with it some portion of the plaintiff's testimony; thereby weakening his case, and strengthening his opponent's. Suppose, in the lapse of years, *Caldwell* and *Woods* had died; (and they must both be very old men now;) in the loss of their testimony would have been involved the loss of his cause by the plaintiff. This is certainly a risk which the plaintiff ran by his delay, and which it was very imprudent in him to have incurred; but if, notwithstanding this lapse of years, and the advantage it gave his opponent over him, he succeeds in presenting to us a full and strong case, shall we reject it? And is not his case, considering the circumstances, wonderfully strong? To me it seems so. Will it be said that the lapse of time has destroyed the witnesses by whom the defendants could have countervailed this evidence? It would be strange indeed, if that lapse had operated more injury to him who stood fortified by the legal title, than to him who, in the teeth

OCEANUS,  
1819.Zane's de-  
vises.  
v.  
Zane.

of such title, had to make out a case by parole evidence:—but the proof of the plaintiff is of such a kind, that I do not see how it could be countervailed, but by proving his witnesses guilty of perjury. If *Woods* and *Caldwell* speak the truth, he makes out a case, not on one side, but on both; and that case taken from the statement of *Ebenezer* himself.

A third ground on which the rule we are considering rests, is, that, by the lapse of time, such a change is operated in the situation of the parties, and the subject matter of the contract, as would in many cases render it's execution unjust:—as, (for example,) if I agreed for the purchase of a tract of land in a young and growing country; for which I was to pay a particular price; I hold off for 6 or 8 years, in which time the land doubles in value; then I come forward, offer the purchase money, and, if the party refuses it, call on a Court of Equity for assistance:—the Court will not give it under such circumstances. A slight attention to the case before us will evince that this reason does not apply to it. The land in question never was, in equity, the land of *Ebenezer*; never in *his possession*. He was suffered, under contract, to get the legal title:—by that permission, the consideration of the contract on *Jonathan's* part was paid, and the obligation on *Ebenezer* to convey was complete. *Jonathan has been ever since in possession*. No change, therefore, in the situation of the parties, or the value of the land, can have so operated as to render it unjust to execute this contract. Thus have I considered the several grounds on which the general rule with respect to length of time is founded, and shewn (as I think) that none of them are applicable to our case.

The last objection made by the defendant's Counsel is, that the plaintiff has made one case in his *Bill*, and another by his *evidence*; that the case in the *Bill* is not good, and, if good, not supported; that the case made by the *evidence*, if admitted to be good, can not support the *Bill*, because not in issue; and because the *allegata* and *probata* must agree. This, I acknowledge is the most formi-

OCTOBER,  
1819.

Zane's de-  
vises,  
v.  
Zane.

dable objection that has been made; for, while I consider that the plaintiff has a clear and strong case, I must agree that it has not been set out to the best advantage in the Bill. If, however, I thought the Bill so defective that a decree could not be rendered upon it; it does not follow that I should dismiss it:—for, where the Court perceives that the plaintiff has a good case, it is sometimes permitted, even at this stage, to file a supplemental Bill; or, if that is not suffered, the Bill is dismissed without prejudice, which leaves the plaintiff at liberty to sue again. I incline to think though, that the case stated, and the case proved, are not so *materially* variant, as to prevent a decree in favor of the plaintiff. In this, perhaps, I am carried too far by that liberal spirit which always inclines Courts of Equity to get over *form*, in favor of *substance*; especially, in support of such a case as the plaintiff's appears to me to be. The Bill first states, that the plaintiff and *Ebenexer* took up the Island in conjunction, and each remained in possession of his respective part.

The words "*took up*," as applied to land, are well understood in this quarter:—they are used to describe those acts which, under the law of 1779, give a claim to settlement or pre-emption rights. By the addition, in the Bill, that the parties held in possession their respective shares, the idea of a partnership, raised by the words "*in conjunction*," is done away. Here, then, is a statement of the plaintiff's original claim to his part of the Island. In a subsequent part of the Bill, it is set forth that, by an agreement between the plaintiff and *Ebenexer*, he (*Ebenexer*) was permitted to obtain the legal title, upon his promise to convey to the plaintiff his share. To be sure, this agreement is so *stated*, that it might be supposed to have taken place *on* the survey; whereas, in fact, it was made *before* that time; but I do not think this ought to prevent a decree; especially, as the defendants do not pretend to disprove the agreement, or to prove one different; but expressly state in their Answer, *that they are entirely willing to yield to the proof of any agreement, which the plaintiff can establish.*

OCTOBER,  
1819.

Zane's de-  
vises  
v.  
Zane.

Thus, upon every view of the case, which I have been able to take, I am of opinion that the plaintiff is entitled to the land he claims. It is therefore adjudged, ordered and decreed, that the defendants, who claim as devisees from their father *Ebenexer*, do, by deed, with warranty against themselves and all claiming under them, convey to the plaintiff the inheritance of the land claimed in the Bill; it being all that part of Wheeling Island lying above a strait line run from the Elm on the East side, (and which is stated in the Surveyor's field Notes and Deposition to be one hundred and eighty two poles from the upper end of the Island,) to the Walnut on the West, (which is stated to be one hundred and seventy four poles from the upper end.) As the defendants state in their answer, that they made efforts before suit to ascertain the nature of the plaintiff's claim, by letter to him offering to execute any contract he had made with their father; and that they have always been willing to yield to any contract he could establish; I do not think they ought to pay costs. It is therefore farther ordered and adjudged, that each party pay their own costs.

From this decree the defendants appealed.

*Wickham* for the appellants.

*Call* for the appellees.

BY THE COURT, the decree was AFFIRMED.

Decided,  
Oct. 26th,  
1819.

## Poindexter against Waddy.

1. If one of two partners in trade give a bond or note, without the consent of the other, and for a debt not contracted with or due from the partnership; such bond or note is not binding on such other partner, at law; nor will a Court of Equity hold him bound on the ground, that the debt in question was contracted by the partner who gave the bond or note, for goods. the greater part of which were applied to the use of the firm; the vendor having retained no lien on the goods so sold; and it not appearing that the other partner agreed to pay his proportion thereof, or was indebted to the partner who contracted the debt.

THIS was a Bill of Injunction exhibited to the Judge of the Superior Court of Chancery for the Williamsburg District, by *Edward S. Waddy*, to stay proceedings on a Judgment obtained against *Bressie Lewis* and the complainant, as merchants and partners trading under the firm of *Bressie Lewis & Company*, by *Carter B. Poindexter*, upon a note under seal for \$463 41 Cents, executed by the said *Bressie Lewis*, who subscribed there to the name of the firm, "*Bressie Lewis & Co;*" for a private debt individually due from himself to *Poindexter*, and without the consent of the complainant.

The Bill stated, that the Writ was served upon the complainant, and no bail required; as appeared by a special endorsement upon it; that he was prevented from defending himself at law, by the express assurance of *Poindexter* that he should not look to him for the money, but meant to get it from *Lewis*:—that, notwithstanding this assurance, execution was issued and levied on the property of the complainant; whereupon, he had given a forthcoming bond with *Edward Frith* as his surety; to whom he *inconsiderately* applied for that purpose; the said *Frith* being a material witness to prove an important fact in the case, which he knew before he became surety:—that the complainant, having failed in attempting to prevail on the Sheriff to take another surety in

2. Where a defendant, who had an adequate remedy at law, has been prevented from resorting to it, by a fraudulent representation or promise of the plaintiff, he ought to be relieved in Equity. (See *Lee v. Baird*, 4 H & M. 453.)

3. A new partner, received into a mercantile firm, upon his buying out the share of an old partner, is not bound to pay any part of the debts previously due from the firm, without a contract on his part to that effect.

4. Upon a Bill of Injunction to a Judgment at law; if it appear that the complainant, as to whom the Injunction is made perpetual, was forced to give a forthcoming bond, and that there is no equity in favour of another defendant to the suit at law, on whom the execution was not served; the Court should so extend the decree as to enjoin that defendant from availing himself of the return of the execution and forthcoming bond, to prevent proceedings against him upon the judgment.

his stead, had no other means of releasing *Frith*, and then obtaining his evidence, but by depositing the principal, interest and costs for which he was bound:—he therefore prayed that a receiver be appointed, with whom he should deposit the money. He also stated, that compensation could not be made for the sum in question, by any profits or share of the said *Lewis* in the concern, to which he was not a creditor; as might be ascertained by an adjustment of the partnership accounts.

OCTOBER,  
1819.

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Poindexter
v.
Waddy.

The Chancellor granted the Injunction, and directed a deposit of the money to be made in one of the Banks in the Borough of Norfolk.

The statements in the answers of *Poindexter* and *Lewis* (who was also a defendant) differed, in some respects, from those in the Bill; but it appeared from the deposition of *Edward Frith*, taken by consent of parties, to be read as evidence in the cause, that, some months before he signed the forthcoming bond, he was present, when a conversation took place between the complainant and *Poindexter*, relative to the suit which then was pending; in the course of which conversation, *Waddy* enquired of *Poindexter*, if he intended to hold him responsible for the said debt; saying that he made the enquiry, because, if such was his intention, he, *Waddy*, must defend himself in the suit; whereupon, *Poindexter* replied that *Lewis* had property enough, and he intended to levy the execution upon him.

It appeared from the same deposition, that *Poindexter* told the witness, that he had been in partnership with *Bressie Lewis*, and had furnished a considerable sum, for which he had received very little; that the business was closed, and the stock sold to *Daniel R. Waddy*; that, from the sickness of *Bressie Lewis*, a settlement of their partnership was for some time delayed; but that they had at last settled, and *Lewis* had given him a certificate of the balance due, with a request to *Edward S. Waddy* to pay him the amount; that he presented the said certificate to the said *Waddy*, who refused to pay the money; that afterwards he returned the certificate to *Lewis*, and obtained from him the note on which the suit was brought.

OCTOBER,
1819.

~~~~~  
Poindexter  
v.  
Waddy.

It was alledged by *Lewis and Poindexter*, that, upon the dissolution of their partnership, the debts and stock on hand were transferred to the firm of *Bressie Lewis & Co.*, of which *Daniel R. Waddy* was then the partner, with his consent; and that *Edward S. Waddy* (the complainant) having afterwards purchased of *Daniel R. Waddy* his share in the concern, received, together with *Lewis*, (by whom the business was still carried on under the style of *Bressie Lewis & Co.*,) the benefit of the said transfer, and therefore was equitably bound, as a partner, for payment of the debt to *Poindexter*:—but *Lewis* did not alledge in his answer, that he gave the note with the consent of *Waddy*.

It appeared, by the Report of a commissioner, to whom the Chancellor referred the accounts between the parties, that *Edward S. Waddy* bought of *Daniel R. Waddy* his share in the firm of *Bressie Lewis & Co.*; that the debts due to *Poindexter* and *Lewis* at the time of the dissolution of their partnership, amounted to the sum of \$444 72 Cents; that the goods transferred to *Bressie Lewis & Company*, were worth between sixty and seventy dollars; but no formal or regular settlement of the co-partnership was made, and no account of the goods so transferred was produced; neither was any report made concerning the state of accounts of the partnership of *Bressie Lewis & Company*.

No replication was put in, to the answer of *Bressie Lewis*: nor was the cause set for hearing as to him.

Chancellor NELSON made the Injunction perpetual: from which Decree *Poindexter* appealed.

*Stanard* for the appellant.

*Leigh* for the appellee.

The following was the Opinion of this Court.

The Court is of opinion that the firm of *Bressie Lewis & Co.* consisting of *Bressie Lewis* and *Edward S. Waddy*, was not responsible, at law, for the debts of *Bressie Lewis & Co.* consisting of the said *Lewis* and *Daniel R. Waddy*; and that the writing, on which the judgment sought to be enjoined was recovered, if it is to be considered as a

sealed instrument, and as intended to bind the company first above mentioned, was not obligatory on *Edward S. Waddy* the appellee, who might have pleaded *non est factum* thereto; and, if not to be considered a sealed instrument, was not binding on him, being given by his partner, without his consent, for a debt not contracted with, or due by the partnership.

OCTOBER,  
1819.  
Poindexter  
v.  
Waddy.

The Court is also of opinion, that the appellee was prevented from making his defence at law, by the representations of the appellant, as stated in his bill; and which statement, though contradicted by the Answer, is clearly proved by the deposition of *Edward Frith*, taken and read by consent, (and to which therefore no objection can be made in this Court,) and by adequate circumstances.

The Court is further of opinion, that the mere circumstance that *Edward S. Waddy* purchased the interest of his brother in the first firm of *Bressie Lewis & Co.*, and that the latter firm of *Bressie Lewis & Co.*, in which the appellee was a partner, had received the greater part of the effects sold by the appellant and his partner to the first firm, is not sufficient, in equity, to charge the latter firm with that debt; there being no *lien* on the property so sold; and it not appearing in this suit, (and to which *Daniel R. Waddy* is no party,) either that the said latter firm made themselves liable, by contract, for the debts of the former, or that *Edward S. Waddy*, when he purchased, contracted with his brother to pay his proportion thereof:—and, as it is neither suggested nor shewn, that *Edward S. Waddy* is a debtor to his partner *Bressie Lewis*, who owes this debt, and which money he might apply to the discharge thereof, there is no ground whatever, appearing in the case, on which *Edward S. Waddy* can be subjected, in Equity, to the payment of this debt. The decree therefore, so far as it goes, is correct, and must be affirmed, with Costs to the appellee.

The Court is further of opinion, that the appellant has a right to enforce the Judgment at law, against *Bressie Lewis*; but, as he might be prevented therefrom by the

OCTOBER, 1819.  
 Poindexter  
 v.  
 Waddy.

return of the Execution and Delivery bond taken in this case, the Decree ought to have been extended so as to enjoin the said *Lewis* from availing himself at law of those circumstances; and this Court, therefore, proceeding to make such farther decree as the Chancery Court ought to have made, it is farther decreed and ordered, that *Bressie Lewis* be enjoined from availing himself at law, of the return made on the Execution issued on the Judgment aforesaid, or of the delivery bond given by the said *Edward S. Waddy*. so as to prevent proceedings against him on the said judgment.

Decided,  
 Oct. 29th,  
 1819.

### Dickenson and others against Holloway.

1. Before the 1st of Jan. 1787, (when the Act of descents took effect,) if a person entitled to a reversion in fee, expectant upon an estate for life, died in the life time of the tenant for life, such person never had *seisin* of the inheritance, and therefore could not transmit it to his heir; but the heir of the person *last actually seised* was entitled.(1)

THE facts in this case, (which was an action of Ejectment in the Superior Court of Caroline County,) were found by a special verdict, and stated by Judge ROANE, in delivering the opinion of this Court, as follows:—

JOHN HOLLOWAY the elder had issue *George Holloway* and *Elizabeth Holloway* by his first, and *John Holloway*, junr. by his second, marriage. He died in 1770. By his Will, he devised the premises in question to his wife for life; the reversion in fee descending on the said *George*

See *Co. Litt.* 11 b. & 15 a; 3 *Co. Rep.* 42 a. *Batcliffe's case*; *Cruise on Real property*, 3 Vol. p. 461-467.

(1) But note that, "where the person entitled to a remainder or reversion exercised an act of ownership over it, by granting it for life or in tail, this was deemed equivalent to an actual seisin of an estate, which was capable of being reduced into possession by entry, and would make the person exercising it a new stock or root of inheritance. For an entry being impossible, the alienation of a remainder or reversion for a certain time, is allowed to be sufficient to change the descent; because such alienation, being formerly always attended with *attornment*, was deemed equal in point of notoriety to an entry on a descent." 3 *Cruise*, 467-8.

as eldest son and heir to his father. *George Holloway* died in 1783, intestate and without issue, leaving the testator's widow then alive and in possession of the premises, who lived, so possessed, 'till the year 1812; after whose death, *John Holloway, junr.* entered, claiming the said land, as heir to his father. *Elizabeth* the daughter (by the first marriage,) also died in 1812, leaving the appellants her heirs at law, who brought an Ejectment for the premises against *John Holloway, junr.* On this case, as exhibited by a special verdict, judgment was rendered for the defendant, whereupon the lessors of the plaintiff appealed to this Court.

OCTOBER,  
1819.  
Dickenson &  
others  
v.  
Holloway.

*George Holloway* having thus died, intestate and without issue, in the year 1783, the widow being in possession of the freehold by virtue of the devise to her for life, the question arises, who was entitled to the reversion in fee of the premises in question?

If the subject in controversy had been a present estate in *George Holloway*, instead of a reversion, a *seisin* by him would have been indispensable to make his sister his heir. It is from him alone as a stock, and not from her father, that she would have been entitled to succeed in preference to the present appellee, and the maxim is that "*non jus sed seisinam facit stipitem.*" If he had not, therefore, a seisin of the freehold, or what is technically called a *possessio fratris*, she could not inherit to him, but her half brother as heir to his father the person last actually seised. *George Holloway* had, it is true, the *jus proprietatis* of the estate in question; but he was deferred as to the enjoyment of the possession, and it was not until a seisin was added to his right, that he could become a stock or ancestor, so as to let in the claim of his sister. Every reason which holds to exclude the brother from being such an ancestor, in relation to a present estate, holds *a fortiori* as to a deferred one, in which a right of property only, exists, and not a present right of possession. The latter case is, at least, as much without that seisin which is requisite to constitute a stock or ancestor, as the former.

OCTOBER,  
1819.

Dickenson &  
others  
v.  
Holloway.

The possession of a lessee for years is considered as that of the tenant in fee; but it is otherwise of the possession of a tenant for life. His possession is referred to the freehold estate to which he is himself entitled. Thus it is held, in *Co. Litt.*, that, if a father maketh an estate for years, and the lessee entereth and dieth, and the eldest son dieth during the term, the younger son of the half blood shall not inherit, but the sister, because the possession of the lessee is the possession of the eldest son, so as that he was actually seised:—but if the father make a lease for life and dieth, and the eldest son dieth in the life time of the tenant for life, the younger brother of the half blood shall inherit; for the tenant for life is seised of the freehold, and the eldest son had nothing but a reversion expectant upon it, and therefore the youngest son shall succeed as heir to his father who was last seised of the freehold. (a)

(a) *Co. Litt.*  
15.

This passage is quite decisive of the case before us.—It excludes *George Holloway* from being such an ancestor as would let in the claim of his sister.

But it is contended that the Act of Descents has now made a difference, and lets in the claim of the present appellants. That can not be, as both *John Holloway* and *George Holloway* died before it's commencement, unless the Act is to have a retrospective operation. Such a construction is reprobated, 1st, by the general principle that all laws, or at least all which concern rights, are only prospective in their nature; 2dly, that that Act is declared to commence it's operation from and after a future and a given day; and the Court is of opinion that these words, "from and after, &c." are to be considered as if they were set out and repeated in the commencement of every section of the Act; and 3dly, that this is emphatically the case in relation to this Act; it declaring that "henceforth," when any person &c. shall die intestate &c." plainly excluding from it's operation cases of deaths before the commencement of the Act. That Act therefore is not to be regarded, in making a construction, in the case before us: the appellants can in no case be re-

garded as heirs, but in relation to ancestors dying after the commencement of the Act.

On these grounds, we are of opinion that the judgment be affirmed.

## Jones against Pilcher's devisees.

Decided,  
Nov. 1st,  
1819.

IN September 1801, a Bill was filed in the High Court of Chancery, by *John Jones* against the devisees of *Edward Pilcher* deceased, to obtain a conveyance from the defendants, of a tract of land in Stafford County, which the Complainant alledged he had, by a *parol* contract, purchased of a certain *John Dalgan* Attorney in fact of the said *Edward Pilcher*.

The Bill stated, that, by a power of Attorney, bearing date February 22d 1794, the said *Dalgan* was authorised to sell the land; that, upon the contract for the purchase, the plaintiff paid him seventeen pounds in part, and took his receipt, which, together with the said power of Attorney, was annexed to the bill as part thereof; that the plaintiff was always ready and willing to perform his part of the agreement, by completing the payment of the purchase money, &c.

The defendants by their Answer said, that they knew nothing of the power of Attorney spoken of in the Bill, and did not believe that such power was given to the said *John Dalgan*, who never was in possession of the land, and consequently never had given the plaintiff possession thereof; and that the seventeen pounds were received on a different account.

*John Dalgan*, who was also made a defendant to the Bill, supported by his answer the claim set up by the Complainant; declaring that he considered himself amply and fully possessed of the land under the power of Attorney from *Edward Pilcher*; that no other person was in possession; that, when he sold the land to the

I. It is not a sufficient ground for a bill of review, that certain documents, on which the Complainant's right to a decree depended, and which he intended to exhibit with his original bill, were lost or mislaid by his Counsel, and not found until after the decree against him. See *Franklin v. Wilkinson*, 3 *Munf.* 112.

NOVEMBER,  
1819.

~~~~~  
Jones
v.
Pilcher's de-
vises.

complainant, he transferred the possession to him, and always conceived him entitled to a conveyance.

It seems that the power of Attorney and Receipt, tho' referred to in the Bill, *were not filed with it*; but two depositions were taken, to prove that such power existed; that, by virtue thereof, *Dalga*n sold the land to *Jones*, gave him a title-bond, and directed a certain *Chandler Cox*, tenant of the land, to pay him the rents; and that the plaintiff paid *Dalga*n seventeen pounds in part of the purchase money.

In June 1809, Chancellor TAYLOR dismissed the Bill with Costs.

In September 1813, the plaintiff presented a Bill of Review, alledging that a decree would not have been pronounced against him, but for the unfortunate *accident* of the power of Attorney, and Receipt for the seventeen pounds, having been *lost or mislaid by his Counsel, and not found until within the last month*. This Bill was supported by the affidavit of *Thomas R. Rootes*, stating, "that the power of Attorney from *Edward Pilcher* " to *John Dalga*n, bearing date the 22d day of February 1794, and the receipt of *John Dalga*n to *John Jones* for seventeen pounds, in part of land sold " under the said power of Attorney, and bearing date " the 15th March 1794, were delivered to the affiant by " *John Jones*, prior to the drawing and filing the original " bill in Chancery in the name of the said *John Jones* " against *Sarah Pilcher* and others; and that the said " power of Attorney and Receipt were lost or mislaid in " office of the said *Rootes*, until within the last month, " when they were discovered in a large law book in the " said office." The power of Attorney and Receipt were also exhibited, and made part of the Record.

The defendants filed a general demurrer to the Bill of Review; which demurrer was sustained by Chancellor NELSON, (the cause having been transferred to the Superior Court of Chancery for the Fredericksburg District,) and the Bill dismissed with Costs; from which decree the plaintiff appealed to this Court.

Upshur for the appellant.

Stanard for the appellees.

NOVEMBER,
1819.

Jones

v.

Pilcher's de-
vises.

BY THE COURT. Decree affirmed; but without pre-
judice to any suit the appellant may be advised to bring,
to recover back the purchase money, alledged to have
been paid by him, from the personal representatives of
Edward Pilcher.

Blankenbeker against Blankenbeker and others.

Decided,
Nov. 1st,
1819.

CHRISTOPHER BLANKENBEKER, by his last Will and
Testament, dated April 26th 1781, devised to his three
sons, *Ephraim*, *Lewis* and *Jonas*, a tract of land, to be
equally divided among them and their heirs at the death
of their mother *Christiana*, to whom he devised the same
for life. The testator died in *May* 1781; *Ephraim* the
eldest son about *May* 1783, under age, intestate, and
never having been married; and *Christiana* the widow,
in *December* 1815. *Lewis* the second son contended that,
upon the death of *Ephraim*, he was entitled to the whole
of his real estate, whether in possession, reversion or
remainder, as his sole and exclusive heir at law:—but
Jonas the third son, the six daughters of the testator and
their husbands, insisted, that an equal partition of *Ephra-
im's* share of the land in question should be made, after
the death of the widow, among all the children.

Such was the case presented, upon a bill exhibited in
July 1816, by *Lewis Blankenbeker* against *Jonas Blan-
kenbeker* and his sisters.

Chancellor NELSON decreed an equal partition, as con-
tended for by the defendants; from which decree the
plaintiff appealed.

The case was submitted here, without argument; and
the following was the opinion of this Court.

ed of the freehold and inheritance. ¶ See ante. *Dickson and others v. Holloway*.

1. A tes-
tator who
died in the
year 1781,
devised a
tract of land
to his wife
for life, and
at her death
to be equal-
ly divided a-
mong his
three sons
and their
heirs. The
eldest son di-
ed before the
1st of Jan.
1787, intes-
tate and
without is-
sue; and the
widow died
after that
day. At her
death, the
second son
was entitled
to one third
of the land
in his own
right, and to
the whole of
another third
as heir to
his father,
who was the
person last
actually seis-

NOVEMBER,
1819.

Blankenbe-
ker
v.

Blankenbe-
ker & others.

The Court is of opinion that, by virtue of the devise contained in the Will of *Christopher Blankenbeker*, exhibited with the appellant's Bill, the appellant *Lewis* and the appellee *Jonas* were each entitled to one third of the tract of land in the proceedings mentioned, on the death of their mother *Christiana* the devisee for life; and that, in the event that has occurred, the descent of the whole remaining third thereof, which was by the said Will devised to *Ephraim Blankenbeker*, deceased, was cast upon the appellant; and none of the appellees are entitled to any portion of that third; and that the said proceedings and decree are erroneous so far as they conflict with this opinion.

Decree reversed, and cause remanded, to be further proceeded in, according to the principles of this decree.

Decided,
Nov. 8th,
1819.

Mann against King.

1. If A. give a power of Attorney, in due form, to B, authorising him "to draw checks, indorse notes, and generally to do all and every act and deed, towards the execution of his business at a certain Bank;" and deposit the said Power in the Bank, to

IN an action of debt in the Superior Court of Henrico County, against *William Mann*, assignor, by *Peyton Drew* his Attorney duly constituted and authorised, of a promissory note of a certain *Harrison Dance*, negotiable and payable at the Bank of Virginia, which note was protested for non-payment; the defendant having pleaded *nil debet*, the Jury found a special verdict; "that *Harri-son Dance* executed the note in the declaration set forth, "at the date therein set forth; (which note they found in *hæc verba*, dated February 26th 1816, for three thousand dollars, value received, payable to *Peyton Drew* or order, thirty days after date, negotiable and payable at the Bank of Virginia;—"that the said note was endorsed, "in blank, by *Peyton Drew* in the declaration mentioned,

be inspected, when called for, by any person interested in matters relating thereto; he is bound to make good, to a *bona fide* purchaser for valuable consideration, any indorsement of a note negotiable at the said Bank, which B. may make in his name as his Attorney; notwithstanding the real object of the said power, verbally declared at the time of it's execution, was to authorise B. to renew certain accommodation paper then in Bank, and not to indorse any other paper.

“by writing his name thereon; and that he also endorsed the said note under his own name in blank, in these words, “*William Mann by Peyton Drew his Attorney;*” “which last endorsement was also in blank; “which said note thus endorsed came lawfully into the “hands of the plaintiff, (*Robert King,*) for a valuable consideration, in the course of business; and that the plaintiff endorsed the same, under the endorsement last mentioned, for the purpose of putting it into the Bank of “Virginia for collection, and for no other purpose; that “he accordingly put it into the said Bank for that purpose, between the date of the said note and the day of “payment; that, on the 30th of March 1816, the day “when the said note was demandable, the days of grace “being then completed, payment thereof was in due “form demanded of the said *Dance*, and, payment not “being made, the same was in due form protested; due “notice being given to the said *Mann* and the said “*Drew;*” (which protest was found *in hæc verba;*) “that, “on the 26th October 1814, the said *William Mann* executed in due form a letter of Attorney to the said *Drew*, “(found also *in hæc verba,*) empowering him, “in his “(the said *Mann*’s) name, to draw checks, endorse notes, “and generally to do all and every act and deed, towards “the execution of his business at the Bank of Virginia; “thereby ratifying and confirming whatever his said Attorney might lawfully do in the premises; which letter “of Attorney was deposited in the Bank of Virginia, on “the day of the date thereof, where it has always remained since that time; the said letter of Attorney having been revoked since the protest aforesaid: that such “powers of Attorney, deposited as aforesaid, are open in “the said Bank, when called for, to the inspection of any “person that may be interested in matters having relation to them: that, at the time the said letter of Attorney was deposited in the said Bank, the said *Mann* “was the last endorser on a note for \$450 drawn by “*Harrison Dance*, and endorsed by *Peyton Drew*, which “said note was discounted in the said Bank; which

MANN,
1819.

Mann
v.
King.

NOVEMBER,
1819.

Mann
v.
King.

"note was afterwards renewed from time to time; the
"said *Drew* endorsing the said renewed notes in par-
"suance of the said power: that, when the said letter of
"Attorney was executed, the declared object of it on the
"part of the said *Mann* was to authorise the said *Drew* to
"renew their former accommodation paper, then in *Bank*,
"and for no other purpose whatever: that the said *Mann*
"was frequently absent from his place of abode in *Rich-*
"mond, being engaged in the performance of a public
"duty, that of Deputy Marshal of the United States,
"which he had long exercised and continued to exercise;
"that he had no personal knowledge of the said endorse-
"ment in the declaration mentioned, and gave no other
"authority for it than the letter of Attorney aforesaid.—
"On the whole matter, if the law was for the plaintiff,
"they found for the plaintiff the debt in the declaration
"mentioned with lawful interest from the 30th of March
"1816, 'till payment, and \$3 75 cents charges of pro-
"test, and one penny damages; and, if the law was for
"the defendant, they found for the defendant.

On this verdict, the Court gave judgment for the plain-
tiff; and that judgment, upon an appeal was affirmed by
this Court.

Decided,
Nov. 9th,
1819.

Shumate against Dunbar.

1 If it be stated, in the transcript of a decree in Chancery, that "the
"canse came
"on to be
"heard on
"the bill,
"answer and
"exhibits,"

THIS was a suit in Chancery, in the County Court
of Fauquier, brought by *Robert Dunbar* against *Armi-*
stead Shumate an absent defendant residing in South
Carolina, and *Joseph Shumate* a resident of the said
County.

The object of the Bill was to subject certain property
belonging to *Armistead Shumate*, alledged by the plain-
such hearing must be understood to have been in exclusion of the depositions con-
tained in the record; no proof appearing of notice of the time and place of taking
those depositions.

2. In such case, if the answer deny the Equity in the bill, and be not impugned
by the exhibits, a decree in favour of the plaintiff should be reversed, and the bill
dismissed.

tiff to be in *Joseph Shumate's* possession, to satisfy a claim of the plaintiff against the said *Armistead*. The answer of *Joseph Shumate* denied that any such property was in his possession. A general Replication was filed by the plaintiff's Counsel, and sundry depositions were taken to impugn the statement in the answer; but *no proof of notice*, by publication in the newspapers or otherwise, of the time and place of taking those depositions, appeared in the record.

NOVEMBER,
1819.

Shumate
v.
Dunbar.

According to the transcript of the Decree, "the cause came on to heard upon the bill, answer and *exhibits*; (*saying nothing of depositions*;) "and, it appearing to the satisfaction of the Court, that proper proceedings had been had against the absent defendant," it was decreed that a negro girl in the proceedings mentioned, be sold at public auction, by the Sheriff, to satisfy the plaintiff's claim, &c.

Upon an appeal, this Decree was affirmed by the Superior Court of Chancery for the Fredericksburg District; whereupon, the defendant *Joseph Shumate* again appealed.

The Decree of this Court was as follows:—

This case having come on upon the bill, answer and *exhibits*; in exclusion of the depositions contained in the record; and the answer having denied the equity in the bill; the decree is to be reversed, and bill dismissed; but without prejudice to any suit the appellees may be advised to bring against *Armistead Shumate*, or against him and any person other than the present appellant.

Decided,
Nov. 10th,
1819.

Wilders against Chambliss's administratrix and heirs.

1. It seems, that, where the annual rent of land descended, is more than sufficient to pay the interest accruing on a bond debt of the ancestor a Court of Equity will not decree a sale of such land, in possession of his heirs, to satisfy the debt; the land being not subject to any *specific lien*, or incumbrance, in favour of the creditor.

(See *Mason's devisees v. Peter's administrators*, 1 Munf. 437.

A Bill was filed in July 1813, by the appellants against the appellees, in the Superior Court of Chancery for the Richmond District; setting forth, in substance, that the plaintiffs had obtained a judgment at law against the administratrix, upon a bill penal, executed by her intestate *James Chambliss* in his lifetime, for the sum of 48*L*.15.7*d*., with interest thereon from the 1st day of August 1801; which judgment (the said administratrix being able to prove, when the same was rendered, a full administration of all the assets which had then come to her hands,) was payable *when assets &c.*; that, shortly afterwards, they instituted an action against the *infant* children of the deceased, upon the same bill penal, and recovered judgment against *them*, for the said debt, interest and costs, *erroneously, without their being defended by guardian*; on which judgment, the plaintiffs therefore supposed, no proceedings could be had:—that the said intestate died possessed of a tract of land containing about 300 acres, in the County of Brunswick, which was all his real estate; and that, recently, the dwelling house thereon had been burnt down; so that, the land being very poor and of little value, the plaintiffs would never be able to recover the said debt, unless they could obtain a decree for the sale thereof, or unless the administratrix had assets. The prayer of the Bill therefore was, for a discovery of assets, and a decree for payment of the debt by the administratrix; or for a sale of the land to satisfy the same, if she had no assets.

By a joint answer of the defendants and a Report of a commissioner, it appeared there was no personal estate to be administered; that the land in question was worth about four dollars per acre; that the *annual* rent thereof was estimated at *forty dollars*, from the time of the death of the said *James Chambliss*, (which appeared to have been the latter end of the year 1802,) until the year 1812, and at *fifty dollars*, afterwards.

Chancellor TAYLOR, "without deciding how far a plaintiff may conclude himself, as to his lien by bond upon land against the heirs at law, by taking a judgment, against the personal representative, when assets; and being of opinion, that it was as competent to the plaintiffs to shew by a scire facias assets, at law, as by bill in this Court; unless under circumstances different from those disclosed by the bill; nay, for aught appears, their remedy was complete at law;" therefore decreed, that the Bill be dismissed with Costs; and that decree was AFFIRMED by the Court of Appeals.

NOVEMBER,
1819.

Wilders
v.
Chambliss's
administratrix
and
heirs.

Pollard against Baylors and others.

Decided,
Nov. 27th,
1819.

THE controversy in this case turned on the authority of the decision in the case of *Pollard v. Baylor's devisees*, reported in 4 H. & M. 223-241; the question whether the same deed of trust therein mentioned, was usurious, or not, being again brought before the Court upon another Ejectment brought by *Pollard*, to which *John and George Baylors*, and sundry persons tenants in possession of the land under them, were defendants.

1. The case
of *Pollard v.*
Baylor's de-
visees, 4 H.
& M. 223-
241, over-
ruled.

A penalty,
inserted in a
contract,
from which
the party
may deliver
himself, does
not make

A special verdict was found, nearly to the same effect with that in the former case, with some additional facts, such contract usurious, and the law is the same where it is in the power of the party, by a compliance with his contract, to convert the penalty into a compensation for services rendered him by the other party.

2. A Creditor, being a *Commission Merchant*, may justly connect, with a contract by which he grants indulgence to his debtor: a stipulation that he shall be allowed the usual commission, according to the course of trade, for selling tobacco, to be shipped to him by such debtor in payment; and, if it be agreed, that such commission shall be allowed in the event of the debtor's failing to ship the tobacco, such agreement is not usurious; for it is competent to the debtor to bind himself to ship it, and agree to pay the commission, as damages for failing to comply with that stipulation.

3. The question whether a contract is usurious, or not, is to be decided with reference to the time when it was entered into; for a contract legal at such time, can not be made usurious by subsequent events.

4. No verdict and judgment in *Ejectment*, can be relied on as a bar to a subsequent Ejectment, though for the same land, and between the same defendants and lessors of the plaintiffs; the fictitious plaintiffs being not the same.

November,
1819.

~~~~~  
Pollard  
v.  
Baylor and  
others.

relating to the circumstances under which the land was sold by the Trustee.

The lessor of the plaintiff moved the Court to grant a new trial, on the ground that the Jury had found *one fact contrary to evidence*; viz, "that, after the execution of the said Deed, the said *John Baylor* did ship and consign to the said *Donald and Burton* one hundred and five hogsheads of Tobacco, agreeably to the covenants in the said deed." The Court was of opinion, "that the said fact was improperly found; it appearing, from the account and settlement made between the said *Baylor* and *Brown* on the 29th of January 1795, (which is set out at large in the special verdict,) that the said *John Baylor* in fact acknowledged that the shipment was, at least in part, made to meet bills drawn by him on *Donald and Burton* in favour of *James Brown*; the said account and settlement being the only evidence exhibited on that subject; yet the Court refused to grant a new trial; first, because it is expressly found that the said *Donald and Burton* (nor either of them) did not in writing request the said *Brown* to make the sale; 2dly, because the sale was not duly advertised, agreeably to the terms of the trust deed; and 3dly, and principally, because the Court of Appeals has already decided that the identical Deed of Trust, on which the lessor of the plaintiff's claim is founded, is void, being given for an *usurious consideration*:"—to which opinion the lessor of the plaintiff excepted; and, judgment being entered against him upon the Verdict, he appealed.

The cause was argued by *Call* for the Appellant, *William Hay, jr.*, *Stevenson* and *Nicholas* for the Appellees, before a special Court of Appeals, consisting of Judges *ROANE*, *COALTER*, *HOLMES*, *SMITH*, *ALLAN*, *PARKER*, and *SUMMERS*.

The following unanimous Opinion of the Court was delivered by Judge *ROANE*.

This is an Ejectment brought by the appellant against the appellees for a tract of land, lying in the County of Caroline. At the trial, the jury found a special verdict.

That verdict sets out a Deed of Trust from *John Baylor* to *James Brown*, of August 24th, 1790, and also a Deed from *Brown* to the appellant, who purchased the land at a public sale. The Verdict has also other findings; in relation to the state of accounts between *Baylor* and *Donald* and *Burton* for whom *Brown* was acting; to the regularity of the proceedings of the trustee previous to the sale, &c. These last findings, however, must be thrown out of our view, under the decision of the Court of Appeals in the cases of *Taglor v. King*,<sup>(1)</sup> and *Harris v. Morris*.<sup>(1)</sup> Under the influence of those decisions, the appellant, having the legal title, without any objection to the Deed on the score of fraud as at the time of the execution thereof, must prevail in a Court of law, whatever irregularities may have taken place, on the part of the trustee, in relation to the sale in question. This view of the subject narrows the case to the construction of the Deed of August 24th, 1790, and particularly to the question whether that Deed is on it's face usurious or not.

NOVEMBER,  
1819.

POLLARD  
v.  
Baylor and  
others.

Before we go into that question, however, a preliminary inquiry is to be disposed of. It is, whether that question is to be considered as an open one, or as concluded by the previous decisions of the Court of Appeals; and we are all of opinion that we are at liberty to go into that question. We are informed that the point was made in the Court of Appeals, and so decided, prior to the constitution of this Court, and that it was only in consequence of that decision that this Court was ordered to be summoned. Had the question been considered as concluded by former decisions, there would not have been a defect of the judges of the Court of Appeals to try the cause.—That decision of the Court of Appeals is, as much as any other, to be respected by us as an authority. But, farther, we ourselves entertain the same opinion. We will endeavour to assign briefly the grounds of it.

The case before us being an *Ejectment*, (and the fourth *Ejectment* between the same parties,) no verdict and judgment which may have taken place in the former ac-

(1) Note. See *Ante*.



NOVEMBER,  
1819.

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Pollard

v.
Baylor and
others.

tions, can be relied on as a *bar* in this. If, however, any decision has been given, and, particularly, by the Court in the last resort, in a former case, it is to be respected as an *authority*. It is to be so respected, if it even occurred between *other* parties. If, between even other parties, a Deed substantially similar to that before us has been held to be usurious, or otherwise, this Court would conform to that decision. This consequence grows out of our system of jurisprudence, which is based and bottomed upon decisions and precedents. While this system, thus understood, affords a check to the arbitrary discretion of the judges, it also sets up a standard by which our Citizens may govern themselves in the formation of their contracts. The solemn decisions of our Courts, therefore, and especially of the Court in the last resort, ought not to be lightly departed from. In the case of *recent* decisions, however, if they be *erroneous*, they ought to be corrected. They ought to be corrected, because they *are erroneous*, and because, being *recent*, they have, probably, not spread their influence extensively into the transactions of other citizens. As to the decision before us, (to be presently more particularly noticed,) it ought, probably, to be considered *recent*, and be corrected, if *erroneous*, even if it were not affected by other circumstances: but the Court is of opinion that its authority is also weakened by other circumstances. The decision relied on to shew that the Deed in question is usurious, is that of October 1809, between the same parties; and found in 4 *H. & M.* 221. That decision, in itself, was only rendered by *two* Judges against *one*. It is also confronted by the adverse opinions of two Judges, (out of four,) stated, in the same Report, to have been solemnly given in a former case between the same parties. It is also weakened by the consideration that, in another case, between the same parties, only twelve months before, (the same three Judges composing the Court,) a *venire de novo* had been awarded. That destination of the case can not be reconciled with the idea that the *then* Court held the deed to be usurious. Had

they then so thought, (and, especially, as we are informed that the question of usury was made and argued,) they would, it is fair to infer, on that ground have decided for the defendant, instead of sustaining the cause, in order to a more perfect verdict. This decision, then, (of October 20th 1808, see note to 4 *H. & M.* 229,) may be set off against the other, and will at least weaken it's authority. But this is not all. The decision of October 1809, is affected by intrinsic circumstances tending to weaken it's authority. One of the Judges composing the majority on that occasion, expressly founds his opinion upon the *facts* stated in the Verdict rendered in that case, and would have been of the same opinion had he considered the Deed not usurious. The question of Usury only follows on, in his opinion, as a supplemental one, and was no how necessary to support his opinion. It might, therefore, be even contended, that this part of his opinion was, in some sense, extra-judicial. When, too, he enters into the question of Usury, he mistakes the contract as to a fact which must entirely have governed his opinion. He supposes that, if fifty hogsheads of Tobacco had been shipped, and found competent to pay the debt, a commission of a guinea a hogshead must still have been paid by *Baylor* for thirty hogsheads more. We are all of opinion that this is a misconception of the terms of the Deed. This mistake, however, must have essentially influenced the opinion in question, and undoubtedly weakens it's authority.

NEVINS, 1819.

Pollard
v.
Baylor and
others.

We are also justified in departing from the decision of October 1809, by the consideration that the Court of Appeals, itself, has departed from it's decision of October, 1808, as is seen in the decision in the case of *Taylor v. King &c.*, before mentioned.

We do not therefore hold ourselves bound by the decision of October 1809, weakened and affected as it is, as aforesaid, but consider ourselves at liberty to go into the merits of the case, as appearing in the Deed in question.

November,
1819.

Poland
v.
Baylor and
others.

As to the contract contained in the Deed, we see nothing objectionable in it. *Donald & Burton*, having a ready money claim against *Baylor*, were neither compellable to wait for payment, nor to receive Tobacco. Being, moreover, Commission merchants, trading in that article, they might justly connect, with the contract of payment, one enuring to their benefit in this last character. This, (as a shipment was intended,) was no how injurious to *Baylor*:—he must have paid *somebody* for selling it, and the compensation is found and agreed to be reasonable. As they, under their contract, were compellable to sell the tobacco, it was competent to *Baylor* to bind himself to ship it, and to agree the damages in case of a non-compliance with this stipulation.

We are of opinion that, in the event which has taken place, of a non-shipment of the tobacco, altho' the term "*Commissions*" is kept up in the Deed, it becomes, in truth, only the agreed damages or penalty for a non-compliance with the contract.

If the Tobacco had been shipped, as was contracted for, all would have been right, and the compensation now objected to, would have been earned by the sales of the Tobacco.

We are all of opinion, that a penalty inserted in a contract, from which a party may deliver himself, does not make the contract usurious; and that the law is the same where it is in the power of the party, by a compliance with his contract, to convert it into a compensation for services rendered.

We are all also of opinion, that the question whether a contract is usurious or not, is to be decided with reference to the *time when it was entered into*; that a contract legal at *that time*, can not be made usurious by subsequent events; and that an usurious agreement is one to pay, *originally*, a greater premium than the law allows. It would indeed be an anomaly, if, the next day after the execution of this contract, it had been adjudged to be usurious, and had afterwards been rendered otherwise by the compliance of the appellee with his contract,

As to the objection that this is a contract between a creditor and a debtor, the case of *Palmer v. Baker*, 1 *Maule & Selwyn*, 66, shews that, in a naked case, and one exhibiting no circumstances of oppression, there is nothing in it. Such is the character of the case before us. There is no ground to object that the contract is usurious, but a *posterior* one arising from the *default of the appellee*, and of which therefore, most emphatically, *he* ought not to avail himself.

We are, therefore, *unanimously* of opinion, that the Judgment should be reversed, and entered for the appellant.

NEWMAN,
1819.
Pollard
v.
Baylor and
others.

Bumgardner and others against Allen.

Decided,
Nov 30th,
1819.

JANE ALLEN exhibited her bill in the Superior Court of Chancery for the Staunton District, against *Jacob Bumgardner* and *Claudius Buster*, administrators of *Isaac Hayes*, and his heirs and representatives, and *James Hayes* and *Jacob Kinney* executors of *James Flack*, and his heirs and representatives; setting forth, that the plaintiff sold *James Flack* three tracts of land, one of 80, one of 100, and one of 400 acres; that a certain *Thomas Walker and Company* had a claim on the 400 acre tract; of which *Flack* being apprised, the plaintiff agreed to abate 100*l.* of the price, and *Flack* agreed to take a special warranty: that the 100*l.* was either compensated by a conveyance of 50 acres more of land, or was to be de-

1. Notwithstanding a clause of general warranty in a deed for land, a Court of Equity will receive *parol* testimony to prove that such clause was contrary to the actual agreement, by which the land was to have been conveyed with *special* warranty

only; the written agreement of the vendor to make the conveyance, not being produced on the part of the vendee to whom it was delivered.

2. If a vendor of land take a duly recorded mortgage of the land itself, to secure the purchase money; the land mortgaged is liable for the debt, to the full amount thereof, into whose soever hands it may come; and in the event of it's being inadequate, the vendee's estate is bound to make good the deficiency:—but a purchaser from him is not personally liable therefor, without a special agreement to that effect.

3. An agreement between a vendee and a derivative purchaser, that such purchaser shall pay the debt of the vendee to the vendor for the land, must be understood as subject to the same limitations and exceptions, as if the contract had been to pay the money to the vendee himself.

NOVEMBER,
1819.

Bumgardner
and others
v.
Allen.

ducted in case of eviction: that this agreement was written by *Flack's* Clerk, *Claudius Buster*, and remained in *Flack's* hands:—that the Deed was ordered to be drawn with special warranty; and, if it now appeared with general warranty, the plaintiff suspected an alteration: that *Flack* gave the plaintiff a mortgage on the land, to secure the purchase money; after which he sold the same to the defendant *Bumgardner* and *Isaac Hayes*; and they sold parts thereof to *James Hayes*; all of them being apprised of the claim of *Walker* and Company, and most probably of the agreement between the plaintiff and *Flack* respecting the special warranty of the 400 acre tract:—that *Bumgardner* and *Isaac Hayes* had never paid the purchase money to *Flack*, nor received deeds of him, nor had *James Hayes* paid them the purchase money of the land he bought; and all had refused, either to pay the plaintiff the purchase money due her, or give her back the land; insisting that her title to the 400 acre tract was defective, and that she was bound by the general warranty to make it good. She therefore prayed relief against the effect of the general warranty; a foreclosure of the mortgage; and general relief.

Jacob Bumgardner answered, as defendant in his own right. He denied notice of the contract for a special warranty, and of any fraudulent alteration of the deed in that respect. He and *Isaac Hayes* bought of *Flack* all the land sold him by the plaintiff, not doubting but *Flack* had a good title, and a general warranty from the plaintiff. At the time of that purchase, he had not heard of the claim of *Walker* and Company; though he had heard of a claim set up by one *Wilkinson*, noted for claiming lands he had no title to. He was told by *Claudius Buster*, that the plaintiff's title was good, and that, otherwise, she would not have warranted the land. The respondent had never seen the plaintiff's deeds to *Flack*. The plaintiff's son came twice for instalments of the purchase money due from *Flack*:—before he came the second time, this respondent had got notice of the claim of *Walker* and Company, and therefore refused to pay any more money. Young *Allen*, at first, doubted, but was

afterwards satisfied, that his mother had given a general warranty. The plaintiff herself came afterwards, and, without suggesting fraud or mistake as to the warranty, being satisfied that *Walker* and Company had title to 330 acres of the land, appeared only anxious to have the amount of deduction fixed. The parties submitted it to arbitrators, who made an award; satisfactory to this defendant, but not to the plaintiff or to *James Hayes*;—he therefore was willing not to insist on that award. This defendant and *Isaac Hayes* sold to *James Hayes* so much of the land as was not claimed by *Walker* and Company, and retained only the part comprised in that claim. He admitted the mortgage, and that the land was bound by it, but claimed a deduction for so much as *Walker* and Company claimed.

NOVEMBER,
1819.

Bumgardner
and others
v.
Allen.

James Hayes answered also in his own right; stating that he bought a part of the land, but had not then heard of *Walker's* claim; (though he had heard of that of *Wilkinson*;) and had no notice of any contract between the plaintiff and *Flack* concerning a special warranty, or of any alteration in the deed she made. He confessed notice of the mortgage, but had never seen the contract or deed from the plaintiff to *Flack*. He had had a survey made, and found that *Walker's* claim would take off two hundred acres of the land he bought, and that by far the most valuable part. He therefore insisted on a deduction from the sum claimed by the plaintiff.

Claudius Buster administrator of *Isaac Hayes*, in his answer, said that he drew the agreement between the plaintiff and *Flack*; that a claim of *John Wilkinson* to a part of the land, was talked of at the time:—the plaintiff believed that *Wilkinson* had no right; but, choosing to avoid trouble, would only agree to give a special warranty; and it was so stated in the written agreement. This respondent knew not that the Deed was made with general warranty, 'till he was told by *Flack*, that the plaintiff had said that, as she herself had a general warranty, she would give him such an one; and that she

Nov 22nd, 1819. *Allen*, did so. He had not the agreement; had never had the deed in his possession; and knew not what had become of the original.

Bumgardner
and others
v.
Allen.

To these Answers, there was a general Replication; whereupon, Commissions were awarded, &c.

The heirs of *Flack*, in their Answer, disclaimed all knowledge on the subject. There was no regular proceeding against the heirs of *Isaac Hayes*.

From the exhibits, it appeared, that Mrs. *Allen's* deeds as Executrix of *Robert Allen* deceased, to *Flack*, contained a clause of *general* warranty: but the original agreement between them was not shewn. Copies were exhibited, of a survey made for *John Wilkinson*, of 800 acres, and of a Patent for the same land to *Thomas Walker*, dated June 12th 1772. The Deeds from *Flack* to *Bumgardner* and *Hayes*, were with warranty against all claims but *Allen's mortgage*.

The depositions proved, that Mrs. *Allen* and *Flack* both knew of *Wilkinson's* claim before her sale to him; that, by the original contract between them, she was to give only a *special* warranty for the 400 acre tract; and that *Wilkinson's* claim and *Walker's* were one and the same.

The Chancellor directed an account of the sum due the plaintiff on her mortgage; of the purchase-money due from *Hayes* and *Bumgardner* to *Flack*; and of the value of the lands included in *Walker's* claim. The Commissioner returned a survey, shewing that 206 acres in all were covered by that claim; estimated at 968 dollars; of which, 119 acres were held by *Bumgardner*, and 194 acres by *James Hayes*. He reported that that part of the purchase-money, due from *Bumgardner* and *Isaac Hayes* to *Flack*, which they agreed to pay the plaintiff, was still in their hands;—payment of the residue being acknowledged by *Flack's* executors; and that 914¹/₂, principal and interest, were due on the mortgage.

April 4th 1812. Chancellor BROWN decreed, that the plaintiff should be relieved from the effect of the *general* warranty; and that the same should be regarded as *only special*; and that, unless the defendants paid her the

balance due on the mortgage before the 1st of October ensuing, the land should be sold by Commissioners to satisfy the debt.

NOVEMBER,
1819.
Bumgardner
and others
v.
Allen

The Commissioners reported, that they had sold the land accordingly, and *Bumgardner* purchased it for \$2840; charges of sale \$67 30; nett proceeds \$2772 70; which sum was paid to the plaintiff's agent, as of date of sale, November 30th 1812.

The Chancellor confirmed the sale; and directed the Commissioners to convey the land to *Bumgardner*: and, it appearing from the said report, that the proceeds of sale were insufficient to discharge the plaintiff's claim, the Chancellor, being satisfied that, by the agreement between *Flack*, *Bumgardner* and *Isaac Hayes*, of Dec. 26th 1800, the latter were bound to pay the plaintiff at least 700*l.*, which, if punctually paid, would have extinguished the whole of her claim, therefore decreed, that the defendants *Bumgardner* and *Buster*, (the latter out of the assets of his intestate,) pay unto the plaintiff the balance due, after deducting therefrom the sum of \$2772 70, the nett proceeds of the sale aforesaid, to be considered as a payment on the 30th day of November 1812.

From this decree, *Bumgardner* and *Buster* appealed.

The cause was argued before a Special Court of Appeals, by *Leigh* for the Appellants, and *Wickham* for the Appellee.

On the part of the appellants, it was contended that, whatever equity the plaintiff might have had, as against her vendee *Flack*, to be regarded as only a special warrantor, and to be relieved from the effect of her general warranty, she was entitled to no such relief against the defendants, who purchased without notice of that equity: (a) that, consequently, the defendants were entitled to a deduction for the land covered by *Walker's* better title, for which the plaintiff did not, and could not, convey a good title: and that, after the plaintiff, over and above the instalments of the purchase money she had already received, had also received the proceeds of the sale of every foot of the land, it was highly unjust to make innocent per-

(a) *Sugden*
476; 2 *Fenb.*
Bk. 2. c. 6. §

NOVEMBER,
1819.

Bumgardner
and others

v.

Allen.

chasers, ignorant of *Flack's* secret contract with her, and misled by her own deed to him, *personally* responsible to fulfil *Flack's* contract to the uttermost farthing. *Flack* alone was so responsible, in the event of inadequacy in the mortgage:—his representatives were before the Court, and should have been decreed against.

On the other side, it was said that this was not a case of a mere equitable title set up against purchasers without notice; for *Mrs. Allen*, being a mortgagee, was a holder of the legal title. Her equity, too, was preferable to their's. It is perfectly clear that the Deed's being with general warranty proceeded from a mistake in the scrivener who drew it. *Flack* himself, long afterwards, acknowledged that he did not know it, but supposed the Deed to have been with special warranty: he therefore could not have misled *Bumgardner* and *Hayes* by telling them that it was with general warranty. It is incontrovertible that they did not buy on the faith of the general warranty from *Mrs. Allen* to *Flack*, but relied on *Flack's* warranty to themselves. *Bumgardner* says he never examined the Deed; *Hayes*, that he never saw it. The Recital in the Deed was, that she sold the land not as her own, but as a trustee, under a power given by the Will of her husband. A general warranty was therefore not to be expected. They knew too that she was about to leave the State.

Their agreement with *Flack* to pay to her the purchase money, bound them to make good the balance unsatisfied by the sale under the mortgage. There was a privity between them and her; for they agreed to stand in *Flack's* shoes; to pay her the money for him; and they paid part in conformity with that agreement.

The only defect in the Decree is, it's failing to give the plaintiff relief, (in default of *Bumgardner* and *Hayes*,) against *Flack's* representatives.

Judge ROANE delivered the Court's opinion as follows:

The Court is of opinion that, notwithstanding the general warranty contained in the deed of Oct. 5th, 1796, from the appellee to *James Flack*, it is fully established by the testimony, that that stipulation was contrary to the

real agreement between the parties. By that agreement, the 400 acre tract conveyed thereby was only to be conveyed under a *special* warranty. Notwithstanding, therefore, the claim of *Walker*, mentioned in the proceedings, to a part of the said land, the said *Flack* and his representatives were bound to pay the full consideration therefor, mentioned in the said Deed. The opinion of the Court further is, that, towards effecting this payment, the *lands mortgaged* by the said *Flack* to the appellee, were liable, *into whose soever hands they might come*; and, in case of a deficiency, that the balance was to be made good out of the *proper estate of the said Flack*. This is the extent of the appellee's claim in this particular; and she has nothing to do with the subsequent contract between *Flack* and the appellants, except in so far as they *may* have bound themselves *absolutely* to pay a sum to her on account of *Flack*; in which case, to avoid circuity, the Decree would be rendered against them, *pro tanto*, in the first instance.

NOVEMBER,
1819.

Bumgardner
and others
v.
Allen.

The Court can not view the contract between *Flack* and *Bumgardner* and *Hayes*, which is thus brought *collaterally* before them, as importing any such *absolute* agreement on the part of the latter. We can not see that there is any essential difference, in principle, between agreeing to pay the vendor himself, and contracting to pay his creditor; and, if *Mrs. Allen* were out of the question, it would be the common case of a general warranty of a tract of land, as to which there is a real outstanding title. Nor can we see that the appellee's case should be differed, and her rights extended, by virtue of the alienation of *Flack*, beyond what they would have been if no such alienation had been made. In that case, her remedy would be limited to the proceeds of the mortgaged estate, and to the balance to be recovered from him or his estate as aforesaid, in exclusion of others. However, therefore, the case may be, as between the representatives of *Flack* and the appellants, and in relation to this claim by *Walker*, the appellants have done nothing in this transaction to subject *themselves* to the claim of the appellee:—they only agreed that a part of

NEWBERRY,
1819.

Bumgardner
and others

v.
Allen.

the money stipulated to be paid to *Flack*, should be paid to *her*, his creditor; but *that* agreement was subject to the same limitations and exceptions, as if it had been contracted to be paid to himself; it *excludes the reported value of the land claimed by Walker*.

This view of the subject excludes the enquiry whether the appellants had notice, or not, of *Walker's* claim, when they purchased from *Flack*. We are inclined to think they had not; but this is immaterial as to the appellee. The ground of holding a purchaser bound, who has notice of an out-standing title in another, is that he acts with a corrupt conscience in purchasing what in equity he knows belongs to another. In relation to *Walker*, (who has also the *legal* title,) this principle would be infringed, on this hypothesis; but it is otherwise as to the appellee. *She* has no land which is thus brought in question; and the appellants are only liable to *her*, if, and so far as, they are brought in, collaterally, by the agreement between them and *Flack*. *Flack's* executors have not answered as to the state of his assets. It may be that his estate is entirely competent to pay the balance due to the appellee, after the sum of \$963, (the reported value of the land claimed by *Walker*,) and the other payments, are deducted. The decree is therefore erroneous, not only in subjecting the appellants to pay the said sum of \$963, but also in omitting to decree against *Flack's* representatives, (including eventually his heirs,) the balance which is due to the appellee as aforesaid.

The Court is further of opinion, that the appellee has the less reason to complain of this construction of the appellant's contract with *Flack*, because the general warranty, contained in her deed as aforesaid, might have tended to mislead *them* as to the reality of *Walker's* claim, and which might, therefore, have produced even a more unqualified stipulation in this particular, than is found to exist.

On these grounds, the Decree is to be reversed with costs, so far as it conflicts with the principles now declared, and affirmed as to the residue; and the cause is remanded, to have that decree reformed, and the cause

finally proceeded in pursuant to the principles of this Decree.

Banister and Wife against M'Kenzie.

Decided,
Dec 2d,
1819.

PREVIOUSLY to the marriage of *John Monroe Banister* and *Mary Burton Augusta* his wife, a Deed of marriage settlement was made, by which it was provided that certain property real and personal, of the said *Mary*, should be invested in *Bank Stocks, or freehold lands or lots* in this State, to be held by *Edmunds B. Holloway*, in Trust to pay the annual profits to the husband and wife, and the survivor, for life, remainder to their children; and, in default of such issue, to the right heirs of the said *Mary*. The said trustee having departed this life before the said investment was made, *Donald M'Kenzie* was appointed by the Superior Court of Chancery for the Richmond District, in June 1816, to act in his stead; whereupon, the parties being at that time unwilling to purchase lots or land; bank stock being high; and Government stock comparatively low; the said *M'Kenzie* invested nearly the whole fund in United States six per cent. stock.

1. If, by a deed of marriage settlement, property be conveyed in trust, to be invested in "Bank stocks, or freehold lands or lots,"—the trustee is not thereby authorised to make the investment in United States six per cent. stock.

In January 1819, a Bill was filed, in the same Court, by *Banister* and wife; admitting that the trustee in purchasing the said 6 per cent. stock had made a very judicious and fortunate temporary investment; but remarking that such investment was *not authorised by the Deed*; and, for various reasons set forth in the Bill, insisting that it would be beneficial to the complainants, as well as their right, to have the trust specifically performed, by selling the said stocks, and investing the proceeds in a tract of land.

The trustee, by his answer, admitted the correctness of the views of the plaintiffs, and the expediency of carrying their wishes into effect; but, as they had only the life estate, and infants were interested, he considered the

DECEMBER,
1819.

Banister and
wife
v.
McKenzie.

interposition of the Court necessary for his instruction and direction. He also tendered a resignation of the trust; requesting the Court to appoint another trustee. The infants, by their guardian *ad litem*, submitted the whole subject to the Court.

Chancellor TAYLOR was of opinion that the purchase of the United States six per cent. stock, under the circumstances of this case, was a good execution of the trust under the deed; and therefore dismissed the Bill:— from which decree the plaintiffs appealed.

The cause was submitted by the Counsel for the appellants; the appellees not appearing; and the following was this Court's opinion.

The Court, not concurring in opinion with the Court of Chancery, that the purchase of the United States six per cent. stock mentioned in the proceedings, was a good execution of the trust confided to the trustee by the Deed of October 15th 1807, reverses the Decree with costs, and remands the cause, to have another trustee appointed, if necessary, and the trust carried into execution pursuant to the prayer of the Bill.

Decided,
Dec. 4th,
1819.

Johnston against Hackley.

1. In a suit by the assignee against the assignor of a bond, if it appear that, after judgment against the obligor, a *feri facias* was returned *nulla bona*; and that, afterwards the assignee sued out a *capias ad satisfaciendum*, upon which the return was "executed on the body of the defendant, who stands committed to the prison bounds, as per bond &c.," the plaintiff can not recover, but must be considered as having brought his action prematurely; because, for aught that appears in the record, the obligor is still in custody under the *ca. sa.*, or may have paid the debt.

RICHARD S. HACKLEY assignee, brought *assumpsit* in the County Court of Spottsylvania against *Richard Johnston*, assignor of a Bond executed by a certain *James Haydon*; stating, in his declaration, that he instituted a suit on the bond, and used due diligence in prosecuting the same; but was unable to recover the money, or any part thereof, of the said *Haydon*; as by the record and proceedings in the said suit, appeared, &c.

At the trial, on the plea of *non assumpsit*, the plaintiff offered in evidence a record shewing that the bond, dated

January 1st 1798, payable on demand, was assigned to him, by *Johnston*, the 1st of March 1800: that the declaration, in his suit as assignee of *Johnston* against *Haydon*, was filed in November 1802; that he obtained judgment, April 7th 1803; that a *feri facias* issued, April 12th 1803, directed to the Sheriff of Spottsylvania, whose return was "no effects;" also a *capias ad satisfaciendum*, June 28th 1803, returned, "not found;" and another *capias ad satisfaciendum*, upon which the return was, "Executed on the body of *James Haydon*, who stands committed to the prison rules and bounds of this County, with *William Grady* security, as per bond dated the 23d January 1804."

DECEMBER,
1819.

Johnston
v.
Hackley.

To this evidence the defendant demurred, and a conditional verdict was found. Upon the demurrer, the County Court gave judgment for the defendant; which was reversed by the Superior Court, on the ground that the plaintiff in "this cause did use due diligence in suing the obligor *James Haydon*, and in adopting a judicious course of execution against him; and that a defect of diligence could not be inferred from the lapse of time between the assignment of the obligation to the plaintiff and the commencement of the suit against the said obligor; there being no evidence given to prove either that the plaintiff knew that the obligor was in declining circumstances, or that the defendant required or called on the plaintiff to commence a suit at an earlier period."

The Superior Court therefore entered judgment for the plaintiff; from which the defendant appealed.

The cause was submitted by the Counsel for the appellant; the appellee not appearing; whereupon, Judge *Roane* pronounced the Court's opinion, as follows.

Although, after the return of "no effects" on the *feri facias* issued against the obligor in the case in question, it was not incumbent on the appellee to sue out a *Capias ad satisfaciendum*, in order to entitle himself to this action; yet, having taken out such Execution, which "tends to satisfy the debt," and as, (for aught appearing in the record,) *Haydon* the obligor is still in custo-

DECEMBER,
1819.

Johnston
v.
Hackley.

dy, under the *ex. sa.*, or may have paid the debt; we are of opinion, that the appellee was premature in bringing this action. On this ground (without attending to other objections arising in the case,) the judgment is to be reversed, and entered for the appellant.

Decided,
Dec. 8th,
1819.

Brown's administrator against Griffiths.

1. A provision in a Will, that the money arising from the sale of the testator's personal property, *after payment of his just debts*, shall be applied to certain purposes, does not create a trust for the payment of the debts, nor take any debt out of the operation of the Act of Limitations.

See *Chandler's executrix v. Neal's executors*, 2 H. & M. 124; *Lewis's executor v. Bacon's legatees and executors*, 3 H. & M. 89.

AN action of *assumpsit* was brought by James Griffiths against Samuel Booker administrator with the Will annexed of William Brown deceased, in the County Court of Lunenburg; for sundry services rendered, money expended, &c., by the plaintiff, for the said Brown in his life time.

The defendant pleaded "*non assumpsit by the testator, and the act of limitations*." Upon the first plea, issue was joined; to the second, the plaintiff replied, in substance, that the testator had, by his Will, *directed his debts to be paid*; and that the suit was brought within five years next after the probate of the said Will. To this replication, the defendant rejoined that he was not, by the Will of his testator, or by his qualification as administrator, bound to pay any debt barred by the said Act of Limitations; and concluded to the Country; and the plaintiff likewise.

At the trial, the plaintiff moved the Court to instruct the Jury, "that a testator, directing by his last Will his debts to be paid by his Executors, takes all just debts which he owes at the time of his death out of the operation of the Statute of Limitations; and that, if it should appear to the satisfaction of the Jury, that the defendant qualified as administrator within five years before the bringing of the action, (the defendant having put that fact in issue by his rejoinder to the second replication of the plaintiff,) the running of the Statute of Limitations is barred; and that the plaintiff's action was not barred by the act of Limitations, for the reason

"in the above proposition contained." to which instruction the defendant objected, "because the directions of the testator by his Will," (which was set forth in *last ver- ba*, bearing date in December 1803, and recorded in September 1804, the time of qualification of the administrator being at April Term 1805,) "did not impede the running of the Statute aforesaid, or prevent it's barring the plaintiff's action, which was instituted on the 11th of August 1808; and because no such fact, as is supposed by the said proposition to be in issue, was put in issue;"—but the Court overruled the defendant's objections, and instructed the Jury as requested by the plaintiff; to which opinion a bill of exceptions was filed. A verdict and judgment was rendered for the plaintiff, and affirmed by the Superior Court; whereupon, the defendant applied for and obtained a Writ of Supersedeas, by order of a Judge of this Court; alledging in his petition, that the Judgment of the County Court ought to have been reversed, "because a direction by a testator, that his debts shall be paid, will not revive a debt upon which the statute of limitations has taken effect at the time of the testator's death;" (a) "and because, if, generally such direction would have that effect, the testator, in this case, only mentions the necessity of paying his debts, incidentally, as a measure necessarily precedent to the compliance with other directions given by him.(1)

DEANMAN,
1819.

Brown's ad-
ministrator
v.
Griffiths.

(a) *Burke*
v. Jones, 2
Fossey &
Beane, 275.

The following was the opinion of this Court.

There being no trust created by the Will in the proceedings mentioned for the payment of the debts of the testator, the Court without deciding what would be the effect of such a trust, if it existed, in a Court of Equity,

(1) Note. In the Will, there was no direction that the testator's debts be paid. The clauses in which the debts were alluded to, merely disposed of "the money arising from the sale of his land, mill and personal property, which should remain after the payment of his just debts; and declared that he did not mean thereby to subject to the payment of his debts, the money arising from the sale of the real property, but of the personal property only.

DICKINSON, is of opinion that the instruction given in the Court below is erroneous.
1819.

Brown's administrator
v.
Griffiths. The judgment is to be therefore reversed, and a new trial awarded, in which the said instruction is not to be repeated.

Decided,
Dec. 10th,
1819.

Mann against the Commonwealth.

1. The Superior Courts of law have jurisdiction to grant Writs of *Supersedeas* to orders of the County or Corporation Courts, binding persons accused of being the fathers of bastard children, to support such children; and the Court of Appeals in like manner, has jurisdiction to correct errors in the decisions of the Superior Courts of law on the same subject.

THE County Court of Cumberland, in October 1816, ordered *William Mann jr.*, who appeared before them on a charge of begetting a bastard child on the body of *Mary M. Hudgins*, (the record not shewing by whom, or in what manner, the charge was exhibited,) to enter into a recognizance to the Governor, himself in the sum of \$500, and his securities in the sum of \$350 each, fifty dollars to be paid annually until the expiration of ten years; to be levied &c.; conditioned that he should indemnify the parish from all charges that might accrue from the maintainance of the said child.

The defendant, "on the trial of the cause, after the Court had ordered him to be bound in a recognizance, moved the Court to make the order so, that, if the bastard child should be bound out to a discreet person by any future Court, the recognizance should then cease to have any effect:"—and this the Court refused to do; to which opinion the defendant excepted.

To this order, a Writ of *Supersedeas* was granted by the Superior Court, but afterwards dismissed, as having been improvidently awarded; that Court, in it's opinion, having no jurisdiction of the case; whereupon the plaintiff in error obtained, from a Judge of this Court, a *Supersedeas* to the said order of dismissal.

2. A person accused of being the father of a bastard child, can not lawfully be bound to support such child, without a written charge before the magistrate by it's mother; nor unless it appear that the warrant was issued by the magistrate upon the application of the *Overseers of the poor*, or one of them, or that they, or one of them, were parties to the cause in the Court making the order against such person.

The case being submitted without argument, Judge **DEANMAN**, 1819.
BROOKS pronounced the Court's opinion, as follows.

The Court is of opinion, on the authority of the case of *Fall v. the Overseers of the poor*, (a) in this Court, that the Superior Court erred in deciding that the *Superse-deas* was improvidently awarded; and it not appearing, by the proceedings in the County Court, that the charge before the magistrate by the mother of the Bastard child was in writing, nor that the warrant issued by the magistrate was so issued upon the application of the overseers of the poor, or any one of them, according to the 23d section of the Act, entitled, "an Act providing for the poor, and declaring who shall be deemed vagrants," (b) or that the overseers or any of them, were parties in the County Court; the Court is further of opinion that that judgment is also erroneous. Both judgments are therefore reversed; the whole proceedings quashed; and judgment is to be entered for the plaintiff in error.

Mann
 v.
 the Commonwealth.

(a) 3
Munf. 495.

(b) Edit.
 of 1794, 1803
 & 1814, c.
 102.

Britton against Williams's devisees.

Decided,
 Dec. 15th,
 1819.

IN an action of Trespass on the case in the County Court of Halifax, brought by *William L. Williams* and others, (*several of whom, being infants, sued by R. C. Williams their next friend,*) against *Isham Britton*, an order of reference to arbitrators was made, by consent of parties, after the writ was returned executed; no declaration being filed. An award was returned in favour of the plaintiffs; to which the defendant by his attorney excepted; 1st for misbehaviour in the arbitrators; and 2dly, for want of reciprocity; in this, that some of the plaintiffs were *infants*, and therefore could not be bound mission, even by rule of Court, ought not to be sanctioned; *even though the award be in their favour*. For, as awards are in the nature of judgments, and are to be final and conclusive, which can not be where one party has a right to avoid them; it follows that a submission by *infants*, although with adults, can not be obligatory on either party.

1. Altho' infants are bound by judgments had under the superintendence and protection of the Court; yet, where the case is referred to arbitrators, whereby they are deprived of that protection a sub-

Brownson,
1819.

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Britten  
v.  
Williams's  
devises.

by the award. The County Court, overruling the exceptions, gave judgment for the plaintiffs; and, that judgment being affirmed by the Superior Court, the defendant again appealed.

The following was the opinion of this Court.

Although infants are bound by judgments had under the superintendence and protection of the Court; yet, where the case is referred to arbitrators; whereby they are deprived of that protection, a submission by infants, even by rule of Court, ought not to be sanctioned. For, as awards are in the nature of Judgments, and are to be final and conclusive, which can not be, where one party has a right to avoid them; it follows that a submission by infants, although with adults, can not be obligatory on either party.

As there was, therefore, no valid submission in this case, there could be no award; and consequently the judgment is erroneous, and must be reversed with costs, as far back as the Writ, and the cause sent to the rules for farther proceedings.



Decided,  
Dec. 16th,  
1819.

### Hunt and others against M'Rea.

1. A judgment at Rules in a Clerk's office can not lawfully be made final, on a declaration in debt, for money lent, and not alleged to be founded on any specialty, bill or note in writing; until a Writ of Enquiry has been awarded and executed.

IN this case an action of debt was instituted in the Superior Court of Prince George County by *John M'Rae* against *Charles Hunt* and *Daniel Dugger*, formerly merchants and partners acting under the firm and style of *Hunt and Dugger*. The writ was not inserted in the transcript of the Record. The declaration was in debt for money lent; saying nothing of any contract in writing. A judgment was entered in the Clerk's office, and confirmed, against the defendants and *William Prentiss*, serjeant of the town of *Petersburg*, "for five hundred and fifty dollars, with interest from the 7th day of October 1817, 'till paid, the debt in the declaration," and costs: to which judgment the defendants and the Serjeant obtained a Writ of *Supersedeas*.

The following was the opinion of this Court.

The Judgment is erroneous in this, that it is made final on a declaration claiming a debt due for money loaned, and not alledged to be founded on any specialty, bill or note in writing. It is therefore reversed, and the cause remanded for a writ of enquiry to be executed, if the defendant does not plead to issue; and with liberty to the Serjeant to shew if he can, that the defendant was improperly held to bail, and that he is not liable to the judgment; this Court not being able to judge thereof, as the Writ, with the endorsement, is not copied into the record.

Decided,  
1819.

Munt and  
others  
v.  
M'Nee-

### Cordle's administrator against Cordle's executor.

Decided,  
Dec. 17th,  
1819.

THE last Will of *William Cordle* the elder, of *Brunswick County*, dated May 16th 1804, and admitted to probate April 24th 1809, (among other clauses,) contained the following: "Item, my will and desire is, that all the remainder of my estate not heretofore willed away, be kept together on the plantation whereon I now live, until my son *William Cordle* arrives to twenty-one years of age; and then my desire is that an equal division of all my personal property be made between my sons *William Cordle* and *Daniel Cordle*; and if either of my sons *William Cordle* or *Daniel Cordle* dies without lawful heir, my desire is that the surviving brother shall inherit all the estate of the deceased."—Agreeably to the direction of the Will, an equal division of the personal estate was made, and sundry slaves were allotted to *William Cordle* the younger, as his proportion of the slaves in that division. He died in the year 1815, of full age, and without having had any issue. *Daniel Cordle* sur-

1. A testator (whose Will was dated in 1805,) directed the residue of his estate to be kept together, until his son W. C. arrived to 21 years, and then that an equal division of all his personal property be made between his sons W. C. and D. C.; "and if either of his said sons died without lawful heir, his surviving brother should in-

"inherit all the estate of the deceased." This was a good limitation over, in favour of the survivor, upon the death of the other son without issue. See *Timberlake v. Graves*, ante. 174.

DECEMBER,  
1819.

Cordle's ad-  
ministrator  
v.  
Cordle's ex-  
ecutor.

vived him, and died in 1816. *Charles Cordle* executor of *Daniel*, thereupon brought Detinue in the Superior Court in the County, for the said slaves, against *Richard Hall* administrator with the Will annexed of *William Cordle* the younger. The parties agreed a case presenting these facts, and a verdict was found subject to the Court's Opinion thereupon.

The Superior Court gave judgment for the plaintiff; and that judgment was affirmed by this Court.

Decided,  
Dec. 17th,  
1819.

### Ellis against Baird and Baker.

1. A suit in Chancery for freedom being dismissed for want of prosecution; the decree was affirmed, without prejudice to any suit at law or in equity which the appellant might be advised to bring, pursuing the preliminary measures to prevent vexatious suits, prescribed by the Act of Assembly.

See  
Edit. of 1794,  
1803 and '14,  
c. 189 p.  
346.

EDWARD ELLIS a man of colour, exhibited a bill in the Superior Court of Chancery for the Richmond District, against *John Baird* and *John Baker*, for an Injunction (which was granted) to prevent the defendant *Baker* from carrying the complainant out of the Commonwealth; and for a decree against both defendants for his freedom. The defendant *Baker* answered the Bill, in July 1818.—The plaintiff by Counsel, *instanter*, replied generally; and thereupon Commissions to take depositions were awarded. At *December Rules* 1818, the cause was set for hearing; and, on the 20th of January 1819, the suit was dismissed with costs, "the plaintiff who was solemnly called, failing to appear and farther prosecute."

At June Term 1819, a motion was made to re-instate the suit, upon a certificate from the Sheriff of Henrico County, dated June 14th 1819, shewing that the said *Edward Ellis* was then confined in the Jail, on account of an execution levied upon him as the property of *John Baker*, and wished to be discharged from confinement, for the purpose of obtaining testimony in support of his claim to freedom. Chancellor TAYLOR rejected the motion, on the ground that he did not "perceive that the defendant *Baird* had been paid a balance with interest due "to him for the plaintiff." And thereupon the plaintiff appealed.

**By the Court.** The Decree in this case is affirmed; but, (in the opinion of a majority of the Court,) without prejudice to any suit at law or in equity, which the appellant may be advised to bring for his freedom, pursuing the preliminary measures, to prevent vexatious suits, prescribed by the Act, "to amend an Act, entitled, " an Act " to reduce into one Act the several Acts concerning " Slaves, free negroes and mulattoes, and for other purposes," passed the 25th of Dec. 1795.

Decided,  
1819.

Ellis  
v.  
Baird and  
Baker.

### Street against St. Clair.

Decided,  
Jan. 13th,  
1820.

THE circumstances of this case are sufficiently stated in the following Opinion of the Court delivered by Judge ROANE, after argument by *Leigh* for the appellant, and *Gilmer* for the appellee.

This was an action on the case brought by the appellee against the appellant in the Superior Court. A verdict was rendered for the appellee. A motion was made by the appellant for a new trial; the rule for which was continued by the Judge to the next term. At that term, the bill of exceptions states, that several affidavits, taken *ex parte* and without notice, of persons who had not given evidence at the trial, were offered in evidence in discharge of the rule; and that a motion by the appellant to reject the same was overruled by the Court. Whereupon, (the record states,) the said rule was discharged, the motion for a new trial overruled, and judgment rendered for the appellee on the verdict. On the next day, it was entered of record, by consent of the parties, that on the trial various witnesses were introduced on both sides; that there was a contrariety of evidence; that the motion for a new trial was made on the ground that the verdict was against the weight of evidence; and that a new trial would have been awarded by the Court, but for the impression made upon it by the affidavits afore-

1. A motion for a new trial, on the ground that the verdict is contrary to evidence, ought to rest on the evidence actually given in at the trial, exclusive of all other: especially, affidavits taken *ex parte*, ought not to be heard on such motion:

DECKMAN,  
1819.

Ellis  
v.  
Baird and  
Baker.

said. This addition to the record, being entered on the order book, received the sanction of the Court, and establishes the important fact, that the decision on the rule was varied by the affidavits in question.

While the Court is not fond of encouraging the practice of enlarging, to a subsequent term, rules for new trials, made on the ground of the verdict being contrary to evidence, on account of the inconveniences which would ensue from a change in the identity of the Judges, it has no hesitation to say, that a motion like the one before us must rest on the evidence actually given in at the trial, exclusive of all other. The objection that the verdict is contrary to evidence, must necessarily have some limit. It is pointed to, and bounded by, the evidence used on the trial. A new trial comes in place of an attain of the Jury; and it would have been highly unjust to have punished the Jury on account of evidence which was not before them. Besides; it would relieve a party against the effect of his own laches, and lay the foundation of increasing motions for new trials to infinity. This ulterior testimony was therefore utterly inadmissible. The objection to it is increased, in the case before us, by the affidavits being taken *ex parte*, and without notice. Whatever liberality may be extended to affidavits, in this particular, in other cases, we ought not to overlook the objection in the case in question. We ought not to control evidence duly taken, and as to which the adverse party had the liberty to cross examine, by testimony in regard to which he was deprived of this important privilege.

We are therefore of opinion to reverse the judgment, and award a new trial.

# Boyd and wife against Hamilton's heirs.

Decided,  
Jan. 14th,  
1820.

UPON an appeal from a Decree of the Superior Court of Chancery for the Staunton District, in a suit brought originally by *Andrew Boyd* and *Mary* his wife against *James Hamilton*, *James Thompson*, and the legal representatives of *William Thompson* deceased.

The Bill stated, that *James Patton*, grandfather of the plaintiff *Mary*, departed this life about the year 1755, having first duly made his last Will, by which he devised certain lands to be sold for the benefit of his two grand children *James Thompson*, and *Mary Buchanan* the plaintiff; among which was an *Entry* lying on the North side of *James River*, in the now County of *Botetourt*, which, after the death of the said testator, was patented in the names of *John Buchanan* and *William Thompson* his executors, as joint tenants of the legal title; that, his debts not requiring a sale of this tract of land, it was agreed by the said Executors, that the land should not be sold, but should itself remain the property of the devisees according to the directions in the Will; that an instrument of writing was executed to that effect, which was afterwards lost:—that, about the year 1769, the said *John Buchanan* died, whereby the legal title became vested in *William Thompson* as the surviving joint-tenant, who died intestate, after the first day of *January 1787*, leaving a number of children; that the land was not taken into possession either by the said *Thompson* who had the legal title, or by those who had the equitable interest:—that, about the year 1774, a certain *David Smith*, with a full knowledge of the right which the representatives of *James Patton* had to the land in question, made a survey including the said land, obtained a patent, and afterwards sold the same to the defendant *James Hamilton*, who had also knowledge of the said pre-existing right, and purchased at his own risk:—that a suit at law was brought by the plaintiffs in the District Court held at the *Sweet Springs*, against *James Hamilton*, to recover the said land; but their Counsel having brought the suit in

1. A plaintiff claiming an equitable title to a tract of land, against the heirs of a trustee, in whom the legal title was by virtue of an ancient patent, and against the heirs of a third person, who have held possession for a long time, by virtue of a patent of subsequent date, ought not to be denied the aid of a Court of Equity on the ground of his not producing the *Entry* on which such ancient patent was founded; if it appear that the land in controversy was covered by that Patent; as to which fact, if the testimony be doubtful, an issue ought to be directed, to be tried by a Jury.



JANUARY,  
1820.

Boyd & wife  
v.  
Hamilton's  
heirs.

the names of the representatives of *John Buchanan* and *William Thompson* jointly, it appeared at the trial that the legal title was in the representatives of the latter solely, and the cause went off on that point:—that, during the pendency of that suit, a survey was directed by the Court, and, on the said survey being executed, the depositions of *William Bilbro* and *William Dempsey*, (both of whom had since departed this life,) were taken at the house of the said *James Hamilton* and in his presence, and filed as evidence in said cause:—that the only defence set up by *Hamilton*, was that the identity of the land was not sufficiently established, altho' he knew, when he purchased, that the land was covered by *Pattou's* claim, and himself had since defaced or destroyed some of the boundaries or line trees.

The plaintiffs prayed, that copies of the depositions of *Bilbro* and *Dempsey*, therewith exhibited, be read on the hearing; that a division of the land be directed, and a conveyance of a moiety thereof to the plaintiffs; and for general relief.

The defendant *Hamilton*, by his answer, denied the equity of the Bill, and demanded proof of most of the allegations, contained in it; relying also on his legal title under *Smith's* patent, and long possession of the land. The plaintiffs replied generally; sundry depositions and exhibits were filed; and the cause was set for hearing as to *Hamilton*; without the service of process upon any of the other defendants. Upon his death, it was afterwards revived against his heirs.

Chancellor Brown was of opinion, "that the plaintiffs had not entitled themselves to have read, as evidence on the trial of this cause, the depositions of *William Bilbro* and *William Dempsey*, (if for no other reason,) because it was not sufficiently shewn that those depositions were regularly taken in the cause at law in which they were filed; that, if they could be read, yet the plaintiffs could not have succeeded in identifying the land which they claimed, and which was in the possession of the said defendant, or, in shewing any title thereto; but, if the plaintiffs had identified the

“ land which they claim, to the satisfaction of the Court,  
 “ and shewn that it was embraced in the grant under  
 “ which they claim, yet they could not have succeeded  
 “ in this cause; being only *equitable* claimants, and re-  
 “ quired to make out a *fair* title to the equitable inter-  
 “ position of the Court, before they would be suffered  
 “ to disturb the heirs of *Hamilton* whose *legal* title  
 “ had been accompanied by a long possession:—that a  
 “ *fair* title was not made out in this case; for, amongst  
 “ other objections to the plaintiffs’ claim, there was no  
 “ evidence of an *Entry* to support the Grant to *Patton’s*  
 “ executors; and an entry was as necessary, in 1753, to  
 “ justify a survey and authorise a Grant, as it has been  
 “ since the Act of 1779; nor ought the Court, in favour  
 “ of one seeking to disturb a possessor of so many years,  
 “ to presume an entry, without some circumstances  
 “ other than length of time to justify it; much less ought  
 “ it be presumed *against* circumstances. The Court  
 “ therefore, if called upon by it’s duty to decide this  
 “ cause finally between the plaintiffs and the heirs of  
 “ *Hamilton*, would certainly decide it against the plain-  
 “ tiffs; but considering them as coming here, under their  
 “ equitable claim, to obtain a conveyance from the other  
 “ defendants the representatives of *Thompson*, and con-  
 “ sidering a Court of law a more proper tribunal to de-  
 “ cide on the admissibility of the depositions aforesaid,  
 “ and on the identity of the land, the Court, dismissing  
 “ the Bill, with costs, as to *Hamilton’s* heirs, will retain  
 “ it against the other defendants; and, when they are  
 “ properly before the Court, will decree a conveyance  
 “ against them, unless they can gainsay the plaintiffs’  
 “ claim; and will then leave the plaintiffs at liberty, if  
 “ they choose it, to pursue their remedy at law against  
 “ the heirs of said *Hamilton*.”

JANUARY,  
 1820.  
 ~~~~~  
 Boyd & wife
 v.
 Hamilton’s
 heirs.

The decree therefore was, that the Bill be dismissed
 as against *Hamilton’s* heirs, with costs; but without pre-
 judice to any suit *at law* which the plaintiffs might there-
 after institute against them for the recovery of the land
 in controversy:—from which decree the plaintiffs ap-
 pealed.

JANUARY,
1820.

Boyd & Wife
v.
Hamilton's
heirs.

Wickham for the appellants.

Leigh for the appellees.

The following was the Court's opinion.

The Court is of opinion that there is error in the Decree dismissing the Bill in this case as to the heirs of *Hamilton*:—first, because such decree would not be binding on *James Thompson* the co-devisee of the female plaintiff, until he was before the Court; and, secondly, because the non-production of the *Entry* in this case, was not a sufficient ground whereon to refuse the aid of the Court, if it had appeared that the Land in controversy was covered by the *patent* under which the appellants claim; which ought to have been enquired into by an issue directed for that purpose. With respect to the depositions of the witnesses *Bilbro* and *Dempsey*, the Court gives no opinion at present, in as much as the case may be changed in the Court of law before whom the issue may be tried.

The Decree is therefore reversed, with costs, and the cause remanded, to be proceeded in; to a final decree, agreeably to the above principles.

Decided,
January 15th
1820.

Jackson against Webster.

1. A plea of *non est factum* ought in general to be received by the Court, notwithstanding the defendant has previously pleaded *payment*; especially, if it be offered under circumstances shewing it is not intended for the purpose of delay.

IN an action of Debt upon a single bill under seal, in the County Court of Harrison, the defendant *Stephen Jackson*, on the 21st day of June 1816, pleaded *payment*; whereupon the office judgment was set aside; the declaration having been filed in March preceding. On the 20th of November following, the cause being called for trial, a motion was made by his Counsel for leave to file the plea of *non est factum*, with an affidavit, thereto annexed, that the said plea was true “to the best of the de-

2. The affidavit to the plea of *non est factum*, is not rendered defective by inserting the words, “to the best of the defendant's knowledge and belief.”

3. No man can be required to swear *positively*, (if at all,) to legal inferences.

"*defendant's knowledge and belief*;" it appearing that the plaintiff's Counsel had notice of this motion on the Saturday before the November term commenced; and it likewise appearing (being admitted by both parties,) that, at the *August* term, a motion was made for the admission of the same plea, but was refused by the Court, upon the ground that the plaintiff's Attorney was then absent upon public business; the plaintiff being in Court, and making the objection in proper person:—to the admission of the said plea at the November Term the plaintiff objected; which objection the Court sustained, and rejected the plea; whereupon, the defendant filed a bill of exceptions, stating these facts, and setting forth the plea and affidavit *in hæc verba*.

JANUARY,
1820.

Jackson
v.
Webster.

A verdict was found for the plaintiff upon the issue previously joined; and judgment was accordingly rendered; which being affirmed by the Superior Court, the defendant appealed to this Court.

Leigh for the appellant.

Wickham for the appellee.

The following was the Court's Opinion, delivered by Judge ROANE.

The plea of *non est factum* offered to the County Court, being one which goes to the *merits*, ought, in the opinion of this Court, to have been received. It ought to have been received for the farther reason, that it was not offered for the purpose of delay. It is not only verified by the oath of the appellant, but was offered at a time when a continuance was already certain, in consequence of the absence of the appellee's Counsel. Nor is the objection to the affidavit, arising from the insertion of the words, "*to the best of his knowledge and belief*," sufficient to exclude the plea. It is true the affidavit must be positive, as to the facts contained in the plea, or on which it is founded; but these words do not render it otherwise, when taken in relation to facts resting on the knowledge of the party. They may possibly have been inserted in this case, in reference to the conclusion of law involved in the averment that the bill in question "is not his

JANUARY,
1820.

—
Jackson

v.
Watson.

Dead;” and, if so, are not improperly inserted. No man can be required to swear *positively*, (if at all,) to legal inferences.

We are of opinion, that our Act requiring the oath in question, while it need not work a change in the forms of pleading, may be satisfied by an affidavit stating and verifying the *facts* only, which are relied on. We must make this construction in subordination to the principle aforesaid. But, in the case before us, *utile per inutile non vitiatur*. Tho’ the party may have gone farther than was necessary, in swearing to the conclusion of the law also, the *facts* are sufficiently verified. The same oath which applies to those conclusions, applies also to the facts on which they are predicated.

We are therefore of opinion that both judgments should be reversed, and the plea in question admitted.



Decided,
Jan. 18th,
1820.

Cocke against Upshaw, and Pritchett executor of Burnett.

1. *It seems*, that a Bill in Equity properly lies to subject the estate of a *secret partner* in trade, to the payment of a debt contracted by the ostensible members of the firm. (See *Watson on Partnership*, p. 16, 46, & 168.)

THE object of the Bill in this case, filed by the appellant, in the Superior Court of Chancery for the Richmond District, was to subject the estate of *Jeremiah Burnett*, unadministered by *Pritchett* his executor, to the payment of a debt for goods sold by the Complainant to *Leroy Upshaw*, who afterwards became insolvent and absconded.

The Complainant alleged that *Upshaw* induced him to let him have the goods, by producing a letter of credit to which the names of *Jeremiah Burnett* and of two witnesses, were subscribed; which order was afterwards declared by the said *Burnett*, and both the pretended witnesses, to be a forgery; but that, in fact, the said *Burnett* was a *secret partner* in trade with the said *Upshaw*, in whose name only the business was carried on; *Burnett*

2. In such case, if the fact of the secret partnership be doubtful on the testimony, the Court should direct an issue to ascertain it.

“being willing to be benefited by the gains, but not to be liable for any of the losses.”

JANUARY,
1830.

Pritchett's Answer denied the secret partnership charged in the bill. Sundry depositions were taken on both sides; shewing confessions and denials, by *Burnett*, of such partnership, on various occasions.

Owke
v.
Upshaw and
Pritchett ex-
ecutor of
Burnett.

Chancellor *TAYLOR* dismissed the Bill, with costs; whereupon the plaintiff appealed.

The following was this Court's Opinion.

The Court, *doubting*, upon the testimony, whether it is not proved in the cause that the intestate *Burnett* was a secret partner with the appellee *Upshaw* at the time of the transaction in question, is of opinion that the Decree is erroneous, in dismissing the bill, instead of causing this fact to be decided by an issue directed for that purpose. The Decree is therefore reversed with costs, and the cause remanded to be proceeded in pursuant to the principles of this decree.

M'Alexander against Harris.

Decided,
Jan. 19th,
1830.

THIS was an action of slander by the appellee against the appellant in the Superior Court of Nelson County; the words charged being, that “the plaintiff was a rogue, “and had stolen the defendant's sheep.”

1. In an action for words, proof of circumstances of suspicion, not amounting to full justification, is not admissible, in mitigation of

At the trial, on the plea of *not guilty*, the plaintiff, having proved the substance of the words imputed to the defendant as slanderous, the defendant moved the Court to

damages, on the plea of *not guilty*.

2. Proof of parol declarations by the defendant, after the institution of the suit for slander, that he did not mean to charge the plaintiff with the crime alleged by the slanderous words, or that the words were spoken in heat of passion, is not admissible in his favour.

3. The defendant in the action of slander, is not to be permitted to prove the general character of the plaintiff as an insulting, provoking and quarrelsome man; nor that, before the speaking of the slanderous words the plaintiff was in the habit of vilifying, insulting and provoking, him and his family.

JANUARY,
1820.

~~~~~  
M'Alexander  
v.  
Morris,

be permitted to prove certain facts and circumstances, not as amounting to actual proof of the plaintiff's guilt, or a complete justification of the defendant, but as showing a *probable ground of suspicion, in mitigation of damages*. He also moved the Court to be permitted to prove, in mitigation of damages, by *Richard Burch* one of the plaintiff's witnesses, that, at a subsequent time, after the speaking of the words, and *after this suit was brought*, the defendant, in another conversation on the same subject, had expressed his concern, to the said witness, for what he had said; stating that the words had escaped him in heat of passion, and would not have been spoken by him in a composed and deliberate state of mind, and that he did not mean to charge the plaintiff with having stolen his sheep and altered the marks. It appearing to the Court that this suit was brought on the day of speaking the words proved by the witness *Burch*, the defendant then moved the Court to be permitted to prove, by other respectable witnesses, that, *after the bringing of the suit*, he had, publicly and at various times, asserted that he did not mean to charge the plaintiff with having actually stolen his sheep, and *explained himself by stating the circumstances aforesaid*; and that the defendant had *further said, after the bringing of the suit*, that at any time when he had charged the plaintiff with stealing sheep and altering the mark, he was excited to heat and passion by the insults and provocations of the plaintiff.— This evidence the defendant also offered, to go to the Jury, as another circumstance in mitigation of damages. He also moved the Court to be permitted to prove the *general character* of the plaintiff, as an *insulting, provoking and quarrelsome* man; and that, *before the speaking of the words imputed to the defendant*, the plaintiff was in the habit of vilifying, insulting and provoking the defendant and his family. But the Court, was of opinion that all the said evidence was inadmissible; whereupon, he filed a bill of exceptions, and, a verdict being found, and judgment rendered, against him, appealed to this Court.

*Leigh* for the appellant, submitted the question whether circumstances of suspicion, not amounting to justification, be not admissible in mitigation of damages; referring to Mr. *Wickham's* argument in the case of *Cheatwood v. Mayo*, 5 *Munf.* 16, and *Knobell v. Fuller* there cited.

JAYMAN,  
1830.

MR. ALEXANDER  
v.  
HARRIS.

Proof that the words were uttered in *heat of passion*, and afterwards *retracted*, is clearly admissible by way of mitigation. In *Snellger v. Shelly*, 2 *Esp. N. P.* 520, repetition of the slander, proving the defendant's ill-will towards the plaintiff, may be given in evidence by way of *aggravation*. *Ex Consequenti*, therefore, the defendant may give *retraction* in evidence, by way of mitigation.

*Nicholas contra.* The defendant pleaded *not guilty*; yet offered in evidence a long string of circumstances tending to fix the imputation on the plaintiff. Such a proceeding is altogether inadmissible:—it is not only against policy and justice, but would injure the plaintiff by entrapping him; for, if the defendant had any facts to justify him, he ought to *plead* them, in order to apprise the plaintiff of the nature of the evidence intended to be offered. Whether the circumstances, tending to prove the guilt of the plaintiff, are strong, or weak, makes no difference. It would be a strange rule that *weak* evidence should be admitted, and *strong* excluded.

In *Cheatwood v. Mayo*, my friend Mr. *Leigh* argued this case very ably, and shewed that the authority of *Knobell v. Fuller* was overruled. The point has been solemnly decided in England. (a) It was decided in *Cheatwood v. Mayo*, for this Court affirmed the Judgment, which could not have been done without deciding that the evidence offered by the defendant was inadmissible. That case and this are perfectly analogous.

(a) *Bull*,  
*N. P.* 9, &  
298; *Phillips*  
*on Evidence*,  
139; *Willes*,  
24, *Smith v.*  
*Richardson*,  
12 *Viner* 159,  
pl. 16. *Dennis v. Pawling*, 2 *Str.*  
1200. *Underwood v. Parks*.

The other evidence offered is equally liable to objection. It was proposed to prove declarations by the defendant *after the suit had been brought*. Such declarations are not admissible in his own favour. The only safe rule is, that declarations made *at the time* of speaking the slanderous words, may be proved; for they are



JANUARY,  
1820.

McAlexander  
v.  
Harris.

part of the fact, and essential to the understanding of it; but it would be a novel and dangerous principle to allow declarations, at a *different time*, especially, after the institution of the suit, to be given in evidence. If this could be done, a man, after slandering another, might, in every case, protect himself from punishment, by his own pretended declarations of the absence of malignant motive. He calls the plaintiff a rogue, and then wants to say he did not mean to impute to him any blame. If he said so, believing him innocent, he was more criminal than if he had said it *thinking* him guilty, though in fact there was no foundation for the charge.

Perhaps, where the plaintiff actually goes into circumstances of aggravation, the defendant may prove declarations at other times in mitigation:—but it does not follow that the latter may be done in every case, because the plaintiff *might* prove circumstances of aggravation, though he does not attempt it.

The defendant moreover wished to prove the plaintiff a quarrelsome man, &c. This also was improper:—1st, because it was calculated to ensnare the plaintiff, by introducing an inquiry not involved in the issue joined:—2dly, because such a course leads to mischievous investigations, and embraces the whole conduct of the parties to each other for years. Nor is the plaintiff's being quarrelsome and insulting, any justification of the defendant for charging him with a specific crime of which he was not guilty. And, as to the plaintiff's vilifying him and his family, the law was open to him for redress. He had no right to set off one slander, by another, imputing possibly a more atrocious crime. It would be productive of the worst consequences to allow such a latitude of evidence. Every thing that happened *at the time*, is admissible: it is part of the *res gesta*: but the defendant can not go into the transactions of the whole lives of

(b) *Philips* both parties. (b)  
*on Evidence*,  
291.

*Leigh* in reply. In trespass for taking away a slave, may not the defendant acknowledge that he took him under a mistaken impression of his being his property, and return him? Would a Jury give the same vindic-

tive damages, as if he still detained the slave? Why then should not the rule be similar in cases of slander? If an acknowledgment in writing be admissible in mitigation, why not proof of a verbal acknowledgment?

Certainly, slander *retracted*, ought not to be punished as severely as slander persisted in.

BY THE COURT, the Judgment was affirmed.

JANUARY,  
1820

McAlexander  
v.  
Harris.

## Robertson against Depriest.

Decided,  
January,  
1820.

THIS was an action of *assumpsit*, in the County Court of Nottoway, for sundries sold and delivered. At the trial of the cause, on the plea of *non assumpsit*, the plaintiff John A. Robertson introduced several witnesses to prove the various items in his account. The defendant's counsel objected to the introduction of this evidence; on the ground, that, in an action of debt some time before determined between the same parties, one of those witnesses had been examined touching the same items claimed by the plaintiff, to repel or set off the credits then claimed by the defendant, although this suit was at that time pending. And this objection was sustained by the Court, and the testimony accordingly excluded; to which opinion the plaintiff filed a Bill of exceptions. Verdict and judgment for the defendant.

The Superior Court of law granted a *supersedeas* to this judgment, but afterwards affirmed it; whereupon, the plaintiff appealed.

The following was the opinion of this Court.

The Court is of opinion that the judgment of the County Court is erroneous in this, that it was irregular to reject the witnesses offered on the part of the appellant, on the ground that the items which they were brought to support, had been decided on in a former suit between the same parties, the record in which suit was no how exhibited to the Court.

1. In *Assumpsit* the testimony of witnesses, offered to prove the items in the plaintiff's account, ought not to be excluded from the Jury upon the ground that, in an action of debt between the same parties, (the record of which action is not exhibited,) determined during the pendency of the action of *assumpsit*, one of those witnesses was examined touching the same items claimed by the plaintiff, to repel or set off the credits then claimed by the defendant.

Both judgments are therefore, reversed with costs, and the cause is remanded for a new trial to be had between the parties.

Decided,  
January,  
1820.

### Self's administrator against Tune.

IN an action of detinue for several slaves, in the Superior Court of Richmond County, (wherein *Self's administrator*, was plaintiff and *Lewis Tune* defendant,) a special verdict was found, upon which the Court was of opinion that the law was for the defendant, and judgment was entered accordingly. To this Judgment the plaintiff obtained a writ of *Supersedeas*; stating in his petition, that the main, if not the only question of law in the case, arose on a deed from *Leasure Hall* to *William* and *Mary Bailey*, granting them certain slaves; (from whom the slaves in the declaration mentioned were descended;) and that question was, whether, by virtue of that deed, they took an absolute estate in the slaves thereby granted; or whether the executory donation, that, for want of heirs of the body of the said *Mary Bailey*, the said slaves, *with their future increase*, should all return and be *equally divided* between the grantor's son and daughter *Jeremiah Hall* and *Anne Lewis*, to the use and behoof of the said *Jeremiah* and *Anne*, *their heirs and assigns forever*, was a valid executory limitation over, of the said slaves and their increase, or not?—The petitioner was advised, that, if *William* and *Mary Bailey* took by the said deed an absolute estate in the slaves, the law on the special verdict was for him, and the judgment erroneous; if, on the contrary, the executory limitation was valid, the law was for the defendant. He contended, that *William* and *Mary Bailey* did take an absolute estate in the said slaves and their increase, by virtue of this deed, the first female donee took an estate for life only; the words "*heirs of her body*," coupled with the words, "*equally to be divided between them*," being to be construed not as words of limitation, but of purchase, describing the persons intended to take.

crease; that they took by the deed an estate in tail special, which was tantamount to an absolute estate, because the executory remainder, limited on the estate tail, and intended to supplant it, was limited on *too remote* a contingency; namely, the failure of issue of the body of the said *Mary Bailey*; that this case presents not a single circumstance to tie up the contingency, and restrain it within the reasonable bounds prescribed by the rules of law for restraint and prevention of perpetuities, unless it be the *equal division* of the said slaves, between the executory grantees, directed by the deed, from which possibly the Court might have inferred, that the executory donation was intended as a *personal* benefit to them, and, therefore, that an unlimited failure of issue of the body of the first taker was not intended; but that circumstance was not sufficient to restrain the generality of the contingency, even if it did evince that a personal benefit *was* intended for the executory grantees; but no such personal benefit appeared to have been intended; for not the slaves only, but their *increase* also were limited over, and the limitation was not to the executive grantees only, but to them, *their heirs and assigns forever*.

*Leigh* for the plaintiff in error.

*Stanard* for the defendant.

Judge ROANE pronounced the Court's opinion.

The appellant in this case claims under *Mary Bailey*; and the validity of her title depends upon the construction of a Deed of August 4th, 1769, made by *Leasure Hall*. That Deed gives five slaves, from whom the slaves in question are descended, to his daughter *Mary Bailey* and her husband *William Bailey*, *for and during their natural lives*, or that of the longest liver of them; and, after the decease of them both, for the said negroes and their increase *to be equally divided* among *Mary Bailey's heirs of her body*; and, in default of *such* heirs, for the said negroes and *their increase* to return and be divided equally between his son *Jeremiah* and daughter *Anne*, and their *heirs* and assigns forever. If these words, "*heirs of her body*," had stood alone, in the limitation

JANUARY,  
1820.

Self's ad-  
ministrato  
r.  
Tune.

JANUARY,  
1830.

Self's ad-  
ministrator  
v.  
Tunc.

after the death of *Mary Bailey* and her husband, we are of opinion that her title would have been absolute, as, in that case, they would have been considered words of limitation:—but the addition of the words, “*equally to be divided*” between them, compels us to construe them as words of purchase, and as a description of the persons who were to take. Nor is this idea varied by the limitation over, “in default of *such* heirs”:—that word “*such*” being a relative term, and in like manner qualifying the meaning of “*heirs*,” as aforesaid. *Mary Bailey* had therefore only an estate for life, and, as the appellant has consequently shewn no title, the judgment for the appellee must be affirmed.

Decided,  
Jan. 25th,  
1830.

### Greenhow's administratrix and heirs *against* Harris and others.

1. A sale  
of Bank  
Stock at  
whatever  
price, is not  
usurious, un-  
less the ob-  
ject be to  
borrow money  
at more than  
lawful in-  
terest, and not to purchase stock, and the price of the stock be graduated as a device to effect that object; or there be a combination between the seller of the stock on credit, and a person to whom the buyer sells it for cash; in either of which cases, the transaction becomes usurious.

THE question in this case was, whether certain Deeds of Trust conveying real estate, executed by Doctor James Greenhow, (late of the City of Richmond,) for the benefit of *Shelton* and *Harris*, and of *Charles Smith*, were usurious or not.

2. If it be alledged, in a Bill of Injunction to prevent a sale under certain deeds of trust, that a previous loan was usuriously made, upon a note at twelve months secured by another Deed; and that one of the deeds aforesaid was made only as a kind of indulgence on that note, and to close some other transactions of the like nature; and the defendant, by his Answer, deny all charges of Usury, and aver that he made no loan, but bought the note fairly in the market, without knowing the consideration for which it was given, (setting forth at what price,) upon condition that “the holder” would get it secured, which was done; that it had long since been discharged, and had no connection with the deeds of trust enjoined; it seems that the Injunction, being unsupported by evidence on the part of the plaintiff, ought to be dissolved; notwithstanding the defendant evades disclosing the name of the holder of whom he bought the note at a large discount.

3. A charge of Usury being explicitly denied by the defendant's Answer, the plaintiff has not a right to an order requiring him to produce his books and papers, for the purpose of establishing such charge.

Three Bills successively, (the two last amendatory of the first,) were filed by the appellants in the Superior Court of Chancery for the Richmond District, for Injunctions to prevent the trustees from proceeding to sell the property conveyed by two Deeds in favour of *Shelton and Harris*, for \$6492, and \$6900, and by one Deed in favour of *Charles Smith* for \$11,851 92 cents; for a decree directing the said usurious Deeds, together with the notes and bonds, (to secure the payment of which the Deeds were given,) to be surrendered and cancelled,—and for general relief.

JANUARY,  
1820.

*Greenhow's*  
administra-  
trix and heirs  
v.  
*Harris and*  
others.

The first Bill alledged that the Usury was publicly known, and the *plaintiffs hoped to prove it*; but that probably the defendants would attempt to elude the justice of the Court by pretending to have sold Stock to the decedent; particularly as *John L. Harris* was a director of one of the Banks.

To this Bill, *John L. Harris* answered, that, as acting partner of the firm of *Shelton and Harris*, he, in March 1813, sold thirty shares in the Farmers' Bank, for \$4092, to the said *James Greenhow*, on two years credit, and took his bond and a deed of trust to secure payment of the money without interest; that the sale was made upon an application of *Greenhow* to purchase; and, at that time, the company had stock to a large amount; that, in April 1814, *Greenhow* offered to purchase fifty shares more, and this defendant sold them to him for \$6900, upon twelve months credit, and took his note and a deed of trust for the same; that, at this time also, *Shelton and Harris* had stock to a much greater amount, and were willing to have transferred the said fifty shares immediately, but *Greenhow* preferred taking their note for delivery thereof upon demand, which, seven days afterwards, was presented for payment, with the said *Greenhow's* endorsement to *Thomas Norvell*, and *Norvell's* to *Charles Smith*, to whom the said shares were immediately transferred by *Shelton and Harris*; that there was no communication for borrowing or lending at either of the said transactions; that these are all the claims of *Shelton and Harris* against the said *Greenhow*; but they had a

JANUARY,  
1820.

Greenhow's  
administra-  
trix and heirs  
v  
Harris and  
others.

former note of his, endorsed by *Samuel Greenhow*, and secured by deed of trust, which had long since been wholly paid off and discharged, and had no connection directly or indirectly with the two sales of stock aforesaid: that stock always sells higher upon credit, than for cash, on fair and regular sales in the market among people of good credit, and without any communication for a loan or any idea of usury on either side; that *Greenhow*, at the time of these sales, was a practising physician, having property to a large amount in possession, and this defendant had no expectation that his affairs were in the embarrassed condition stated in the Bill.

The Answer of *Thomas Norvell* (a Broker,) stated, that, in March 1813, Doctor *Greenhow* requested him to make negotiations for him to a considerable amount; and, accordingly he bought thirty shares in the Farmers' Bank, for the said *Greenhow*, of *Shelton* and *Harris*, at \$133 46 per share, upon two years credit; twenty of which shares were afterwards transferred to him, who credited *Greenhow* with them, at \$128 per share: that, in April 1813, he bought of *Charles Smith* ninety three shares of like stock, at one and two years credit, for *Greenhow*, who gave his bonds for \$5624 64, and \$6227 28 cents, for the same; forty of which last mentioned shares were transferred to him to be sold for *Greenhow*, who had credit for them on his books at \$108 per share: that, in April 1814, he bought of *Shelton* and *Harris* fifty shares of like stock for \$6900, for *Greenhow*, who gave his note and a deed of trust to secure payment of the money; but no transfer of the stock was then made, as *Greenhow* did not wish it, but chose that he, the respondent, should sell the stock for money; and therefore he took the note of *Shelton* and *Harris*, to transfer on demand; which note *Greenhow* afterwards assigned to the said respondent, who sold the shares for \$5700 to *Charles Smith*, to whom the respondent assigned the said note, and *Shelton* and *Harris* transferred the shares: that he transacted business as broker for *Greenhow* at various times; and, at the time of the transactions aforesaid.

could not obtain as favourable terms for him from any other person.

JANUARY,  
1820.

The Answer of *Frederick Harris* administrator of *Charles Smith*. He understood, from his intestate, that *Greenhow's* debt was contracted for Bank Stock. The said *Smith* was a dealer in stock, which he sometimes bought for cash, and sold at an advance upon credit; but he sometimes lost by stock's falling below the cash prices he had paid. This respondent believed the transactions with *Greenhow* were fair; and that stock could not then have been purchased, upon the same credit, at lower prices.

*Greenhow's*  
administratrix & heirs  
v.  
*Harris* and  
others.

The plaintiffs in their 2d Bill, repeated their averment that the claims of the defendants were founded upon illegal and usurious considerations, and said they were "now prepared to prove the facts in most instances, and hoped, by having sufficient time allowed them, to be able to prove the whole." They charged that, on or about March 1813, *Shelton* and *Harris* loaned \$2000 to *Doct. Greenhow*, upon his note for \$2400 payable at twelve months after date, endorsed by *Samuel Greenhow*, which note was secured by a Deed of Trust; that the sales of the stock were merely devices to cover usurious contracts, and the pretended sale of fifty shares was made only as a kind of indulgence, for the \$2400 note, and to close some other transactions of the like nature; that *Shelton* and *Harris*, *Norvell* and *Smith* were usuriously combining to shift the same stock from hand to hand; that no such stock was ever transferred to the said *Doct. Greenhow* by the said *Shelton* and *Harris* at the time spoken of, or at any other time; that *Smith* transferred 43 shares only, instead of 93; and had, during all the year 1813, but 73 shares, as appeared by a Certificate of the Cashier of the Farmers' Bank.

The Answer of *Thomas Norvell* to the last mentioned Bill, referred to, and insisted upon, his former Answer; averring that he never received any usurious interest of *Greenhow*; that he had no interest in any of the contracts in question; and believed that *Greenhow's* transactions, with *Shelton* and *Harris* and *Charles Smith*, were sepa-



JANUARY,  
1820.

Greenhow's  
administratrix & heirs  
v.  
Harris and  
others.

rate and distinct; that the statements in his answer concerning the transfers of stock were true, notwithstanding the Cashier's certificate, which was itself erroneous, as would appear by two countervailing and explanatory certificates of the same Cashier: that this respondent knew nothing of the number of Bank shares standing in the name of *Smith*, further than the last mentioned certificates shewed:—that *William Norvell*, on the 19th of April 1813, transferred ten bank shares to *Greenhow*, which this defendant as his Attorney transferred to *Smith*, who, afterwards, transferred them back to *Greenhow*; and that the said ten shares, added to the 83 mentioned in the Cashier's certificate, made up the 93 furnished by *Smith* to *Greenhow*.

The Answer of *Smith's* administrator referred to his former Answer, and averred that his intestate actually transferred 93 shares; as appeared by two entries on the decedent's books, which were all that he found relating to the subject; that, as *Smith* was a dealer in stock, he might without fault happen to sell *Greenhow* part of the same stock he had before purchased of him; it being of no importance to the purchaser in whose name it stood, if he got it; and that this defendant had discovered no document proving Usury.

*John L. Harris* filed an Answer, and afterwards an amended Answer, to the said Bill, in which (taken together,) he repeated the allegations in his Answer to the first Bill, and denied that *Shelton* and *Harris* lent *Greenhow* the money paid for the \$2400 note; averring that he bought the note fairly in the market at the price of \$2,212 or thereabouts, upon condition that "the holder" ("not mentioning who the holder was,) would get it secured; which was done; that that note had long since been discharged, and had no connection with the sales of stock; that he knew not the consideration for which the said note was given; that neither of the notes, given on the said sales, was usurious, or founded upon any communication for a loan; but that *Shelton* and *Harris* merely wished to sell their stock, of which they had a large quantity, and

could, on the same credits, have gotten the same for it, from persons of undoubted solidity.

The third Bill stated, that *Greenhow* employed *Norvell* to raise money, and not to buy stock; that *Shelton* and *Harris*, and *Smith* all knew that the negotiations were undertaken for usurious purposes, which, as to *Shelton* and *Harris*, was evidenced by their refusing to take, without farther security, the \$2400 note, though endorsed by *Samuel Greenhow*, and by their evading a direct answer to the charges respecting it. This Bill contained also other allegations concerning the possession, by the parties, of the several parcels of stock transferred, the rapidity of the transfers from one to another, and some conversations between *Harris*, *Smith* and *Norvell*, from which the complainants inferred usury, and a fraudulent connection and combination among them to the injury of *Greenhow*. It objected to the former answers for not stating the prices per share at which *Smith* sold to *Greenhow*, but only that the latter gave his notes for \$11,851 94 cents, for the supposed 93 shares. The 2d, & 3d Bills both demanded the production of the books and papers of the defendants before a Commissioner of the Court, without which it was contended the true nature of the transactions could not be fully known, and a fair and legal settlement of the accounts between the parties be made.

JANUARY,  
1820

Greenhow's  
administra-  
trix & heirs  
v.  
Harris and  
others.

The answer of *John L. Harris* to the 3d Bill, denied that the sales of stock made by him to the said *Greenhow* were pretended, or a shift or contrivance to cover a loan; repeating his averment that the stock was absolutely sold and transferred. "What might have been the views of said *Greenhow* in buying the stock, or what might have passed between the said *Greenhow* and his the said *Greenhow's* agent, it is impossible for this defendant to say; but he can say, and does aver, that, in both instances, the application was made to him not for a loan, but for the purchase of stock, which stock was then held by *Shelton & Harris*. This defendant had no concern or connection with *Norvell* or *Smith* in the said Stock, or the proceeds thereof; and there was no un-

JANUARY;  
1820.

Greenhow's  
administra-  
trix & heirs  
v.  
Harris and  
others.

“derstanding, stipulation or agreement between him and  
“the said *Greenhow* as to the use or application that the  
“said *Greenhow* should make of it:—he had a right to  
“do what he pleased with it.” As to the note of \$2,400,  
this answer was nearly in the same words as the former,  
still failing to state *who* “the holder” was, of whom that  
note was purchased. The charges of Usury were again  
expressly denied. The respondent said that his books,  
or the books of *Shelton & Harris*, would not in any par-  
ticular afford the slightest foundation or support to those  
charges; but insisted that the demand for their produc-  
tion was wholly unwarranted by the usage of this Court  
and the laws of the Country.

*Smith's* administrator and *Norvell* again answered,  
denying the connection and combination charged, and new  
matter of equity set forth, in the last Bill; and also the  
right of the plaintiffs to call for the books and papers,  
which had also been denied in their former answers.  
*Norvell* particularly said, that “when he purchased the  
“said Bank stocks, he made no communication for a loan,  
“as *Greenhow* did not mean to borrow, but to purchase on  
“credit.”

The plaintiffs filed exceptions to these answers of  
*Harris* and *Norvell*, as insufficient and evasive:—1. to  
that of *Harris*, for not stating the precise sum given for  
the note of \$2400; nor *how* that note was discharged or  
settled; and for not stating (tho' required by the Bills,) *who*  
was the holder of the \$2400 note, and *who* procured  
the security for the payment of it, before *Harris* would  
take it:—2. to that of *Norvell*, because it did not shew  
the transaction relating to the said note, nor how it was  
discharged; and whether the balance received by him of  
*Smith* was applied to the discharge of it, or how that bal-  
ance was applied; because the respondent refused to make  
any statement of *Greenhow's* notes in his possession  
which had been paid off; altho' the surrender of them was  
demanded by the Bill; and because he did not discover  
*all* that he knew of the transactions of *Greenhow* with  
the other defendants.

Chancellor TAYLOR again dissolved the Injunction, which, twice before, had been dissolved and re-instated.(1) From this order, the plaintiffs were allowed an appeal, upon their Petition to a Judge of this Court.

*Upshur* for the appellants. Where the *intention* is to commit Usury, the particular *form* of the contract is not to be regarded.(a) It is evident that the intention in this case was not a purchase of stock; for *Greenhow* did not wish to keep the stock, but merely to raise money. He actually kept it not more than two days. The idea that he bought on speculation, is contradicted by all the circumstances, which plainly shew that his object was to convert the stock into cash at whatever sacrifice. The price given was so exorbitant, that no man in his senses would have made such a bargain, for purposes of speculation, or to retain the stock.

*John L. Harris's* Answers do not deny the charge that he knew *Greenhow's* object to be merely the raising of money. He evades it even to the last, giving no direct answer as to this point, but struggling very hard to appear to answer the questions put to him, without doing so. If he had not actual notice that such was the object of *Greenhow's* application, he had at any rate constructive notice; for *Norvell*, being a public broker was the agent of both parties,(b) and he had actual notice, by which therefore *Harris* was bound.(c)

The knowledge of *Harris*, that *Greenhow's* object in procuring the stock was to raise money, makes the transaction usurious, as completely as if the contract had been for a direct loan.(d) From 2 *Campb.* 375, it appears that, where a ground of suspicion of Usury is raised, it is incumbent on the party to remove it, or he will be considered guilty. In this case, if the proof be not direct, there are many strong grounds of suspicion. The risk of loss on the part of *Harris* was very small; and this is one of the badges of Usury. The sale of stock on long credit, is another;(e) for bank stock is a cash article, and it is exceedingly unusual to sell it on long credit.—

JANUARY,  
1820.

*Greenhow's*  
administra-  
trix & heirs  
v.

*Harris and*  
*others.*

(a) *Floyer*  
v. *Edwards*,  
*Cowp.* 112;  
*Chesterfieldy*.  
*Janssen*, 1  
*Atk.* 301.

(b) *Marteney* v. *Coles*,  
1 *Maule and*  
*Selwyn*, 140.

(c) *Brotherton* v. *Hatt*  
and others, 2  
*Vern.* 574;  
*Jennings* v.  
*Moore*, *Ibid.*  
609; *Le Neve*  
v. *Le Neve*,  
3 *Atk.* 646.

(d) *Hawbrough* v.  
*Baylor*, 2  
*Munf.* 36;  
*Watkins* v.  
*Taylor*, *Ibid*  
424; *Cro.*  
*Eliz.* 643.

(e) *Hammett* v. *Yea*, 1  
*Bos. & Pull.*  
155; *Marsh*  
v. *Martindale*, 3 *Bos.*  
& *Pull.* 159.

(1) Note. The charges in the Bills were not supported by any affidavit or deposition.

JANUARY,  
1819.

Greenhow's  
administra-  
trix & heirs  
v.

Harris and  
others.

(f) Orde  
on Usury, 77;  
2 Wm. Bl.  
rep. 864,  
Murray v.  
Harding; 1  
Esp. N. P.  
cases, 11, Doc  
v. Barnard.

The *exorbitancy of price* in the sale of an article, furnishes also a reason for suspecting Usury; (f) and here the disproportion between the cash and credit prices of the stock was enormous. The *distressed condition of Greenhow* for want of money, (which *Harris* well knew,) is also to be considered.

He relies in his Answers, repeatedly, on the circumstance that no *express communication* for a loan took place: but such communication will always be presumed where the real intention of the parties was to borrow on one side, and lend on the other. In *Watkins v. Taylor*, 2 Munf. 424, it was denied that there was any communication for a loan; yet this Court decided the contract was usurious; surely on the ground that such communication might be presumed. So also in the case of *Gibson v. Fris- toe*, 1 Call 62.

*Harris's* not *thinking* the transaction usurious, if such (g) *Moore* were the fact, would make no difference in the case. (g) *v. Battie*,  
*Ambl.* 271.

As to the note for \$2400, *Greenhow* himself was evidently the "holder," of whom *Harris* bought it at an usurious discount; otherwise, *he* would not have given the subsequent deed of trust to secure the payment; for if the note had been in the possession of another person who offered to transfer it, such other person, (being requested by the transferee,) would have given the security, and not applied to *Greenhow*. The sale of the note was therefore palpably a shift or device to evade the statute. But a note made for usurious purposes, is void in the hands of any body. *Quod initio non valet, tractu temporis*

(h) *Young*  
*v. Wright*, 1  
*Campb.* 141;  
*Jordaine v.*  
*Lashbroke*, 7  
*Term Rep.*  
601; *Steers v.*  
*Lashley*, 6  
*Term Rep.*  
61.

*non convalescit.* (h) So far as *Charles Smith* is concerned, the Usury is yet more apparent. It is a striking circumstance, that, when he undertook to sell ninety three shares of stock for the enormous sum of \$11,851 92 Cents, he did not own a single share! He never transferred more than *eighty three* shares, though he took the bonds and deed of trust for the price of *ninety three*. Is not the conclusion irresistible that the ten shares not transferred were the premium for the loan? It is impossible by arithmetical calculation to find any integral sum as the price by the

share for the 93 shares of stock in this case. The very extraordinary fractional sum of \$127 44, appears to have been the price agreed upon.

JANUARY,  
1820.

Greenhow's  
administra-  
trix & heirs  
v.  
Harris and  
others.

There is no difference in principle between the case of *Marks v. Morris*, 2 *Munf.* 407, and this case. In this, the plaintiffs do not sue for a *discovery*, any more than in that case.

If, upon the whole, the Court should not consider the *Usury* proved, the Contracts may perhaps be set aside as *unconscionable.*(i)

Call for the appellees, contended, 1. That the prices of the stock were not exorbitant; but, if they had been, that mere exorbitancy of price, without any previous communication for a loan, or forbearance, is not *Usury.*(k)

(i) *Chesterfield v. Janssen*, 1 *Atk.* 301.  
(k) *Orde*, 73-75; *Murray v. Harding*, 2 *Wm. Bl. rep.* 862, 864; *Es* 3 *Wils.* 395; *Jones v. Hubbard*, in this *Court*; 4 *Le-on.* 208; 1 *Anderson*, 121.

2. That there was no evidence of any loan, or communication for a loan, or forbearance, as to *Shelton and Harris*; but the transactions were sales of stock in their possession at the times of the sales, and for the credit prices at those periods. There are no circumstances from which to infer an usurious intent; and usury is not to be *presumed*, without proof.(l)

3. That *Smith's* contract was not usurious; because, in that case also, there was no communication for a loan or forbearance, and the price was the credit price of the day. It is not material whether he had stock at the time or not; for there is nothing improper in a man's contracting to furnish stock, although he have none at the moment of contract. He was a dealer in the article, and every thing done in the *course of trade* is lawful.(m) In fact, he had some stock at the time, and purchased more to enable him to comply with the contract. His getting some from *Norvell* makes no difference; for both were in the market, and he might lawfully buy of him.

(l) *Lamengo v. Gould*, 2 *Burr.* 716; *McGuire v. Parker's ex'or.*, 1 *Wash.* 368.

(m) *Floyer v. Edwards*, *Comp.* 112.

4. There was no connection between *Shelton and Harris* and *Smith*; nor between them, or either of them, and *Norvell*.

None of the circumstances resemble the case of *Watkins v. Taylor*, 2 *Munf.* 424; for that was, in substance, an advance of *money*, to be restored with interest be-

JANUARY,  
1820.

Greenhow's  
administra-  
trix & heirs  
v.  
Harris and  
others.

yond the legal rate. In *Marks v. Morris*, too, the usury was *proved*, which is not the case here.

*Leigh* on the same side. The simple question before the Court is, whether a sale of Bank stock on credit, at an advance above the cash price, be Usury? Could not Doctor *Greenhow* have wanted the stock to enable him to comply with a contract for the delivery of stock? If he might have wanted it for any other purpose than that of raising money upon it, the presumption of Usury does not arise. To constitute Usury, there must be a corrupt agreement, concurred in by *both* parties. (a) *Harris* is guilty of no evasion:—for he says, expressly, that he did not know for what purpose *Greenhow* wanted the stock.

(a) *Price*  
*v. Campbell*,  
2 Call 110—  
124.

Stock is not like money, having a certain value, but an article liable to continual fluctuations. The value at a future day being contingent, a sale at a high price on credit is not usurious. (o) Was it improbable that stock might have risen before the time of payment, to 122 or 130 per cent?

(o) *Mad-*  
*deck v. Rum-*  
*ball*, 8 East  
304; *Orde*,  
46; *Pike v.*  
*Ledwell*, 5  
*Esp. N. P.*  
*cases* 164.

The case of *Hansbrough v. Baylor*, 2 Munf. 36, is identically *this*; except that *there* the article sold was a *bond*; and here it was bank stock. Suppose it had been *tobacco* or *goods*; would the vendor be an Usurer, because the vendee sold afterwards, for Cash, at a loss? If not, why is a vendor of *Bank stock* to be so considered?

*Wickham* on the same side, observed, that a *Broker's* being employed in the negotiation for the stock, was not a suspicious circumstance. The uniform practice, where a man wants to buy stock, is to go to a broker. The profession of a broker is honest and lawful; and stock is as much an article for sale, as wheat, or tobacco,—land, or slaves.

Mr. *Upshur* says the answer is evasive. How is it evasive? It says the transaction was a fair, *bona fide* sale, and not a loan. Is not this directly responsive to the Bill? He says the Bill is not for a *discovery*. Yet it demands the production of books and papers, and accounts to be rendered. If then it be not a bill for *discovery*, what is it? If the answers of the defendants be

not relied on, where is the proof on the side of the plaintiffs?

JANUARY,  
1820.

He is mistaken on the subject of the 93 shares. It appears in the record that *Smith* bought 10 shares of *Norrell* to make up the quantity. A buyer and seller of stock, as well as a trader in bills of exchange, has a right to make his selling, different from his purchasing, price.

Greenhow's  
administra-  
trix & heirs  
v.  
Harris and  
others.

January 25th 1820, the Judges delivered their opinions.

Judge COALTER. I am of opinion that there is no error in the decree appealed from, and which dissolves the Injunction as it regards the debts created by the intestate of the appellants with *Shelton and Harris* and *Charles Smith*, for the different sales of stock by the latter to the former; it not appearing that there was usury in either of those transactions.

As to the debt of \$2400 formerly due to *Shelton and Harris*, and which has been paid off, if usury existed in that case, the appellants, on proving it, or on it's being confessed by the appellee *Harris*, should a further answer from him be required by the Court of Chancery, will be entitled to a decree for the usurious interest, as they will also be for the usurious gain in the other transactions, should they hereafter prove usury in them.

The Decree must therefore be affirmed.

Judge BROOKE concurred.

Judge ROANE. It will be inferred from my opinion delivered in the case of *Taylor v. Bruce*, (1) the other day, that I distinctly admit the right of a party to sell property, such as Bank shares, at whatever price is agreed on. The transaction becomes usurious, only when the object is to borrow money, and not purchase stock, and the price of the stock is graduated as a device to effect that purpose; or where there is a combination between the seller of the stock on credit, and the purchaser for cash; as, for example, in this case, between *Smith and Shelton and Harris*. Such a combination or connection is explicitly disavowed in this case, and is not proved:—

(1) The case of *Taylor v. Bruce* was re-considered, and not finally decided until June 1820.



JANUARY,  
1820.

Greenhow's  
administra-  
trix & heirs  
v.

Harris and  
others.

nor is it in any manner proved, that the purpose for which the parties met was to borrow money rather than buy stock. The contrary is not only shewn by the answers of *Harris*, but it is explicitly proved by *Norvell* that *Greenhow's* purpose was not to borrow money, but to purchase Stock. So much for the purchase of stock.

As for the note for \$2400, it is said the injunction has not been applied for, or granted, as to the Deed securing the payment of it. If it had, it would readily have been perpetuated on the admission of *Harris*, that that debt has long since been paid. As to it, the transaction is said to be closed. If it had been paid by merely being carried into the *other debts*, it might deserve a different consideration:—but that idea is explicitly reprobated by the repeated answers of *Harris*, that that debt was *wholly unconnected* with the sales of stock.

Although, therefore, it is possible, and even probable, that these transactions were founded in usurious views on the part of all the parties, we can not say so upon this record, and therefore I concur in opinion that the decree be affirmed.

Decree affirmed unanimously.

Decided,  
Jan. 27th,  
1820.

### **Anderson's administrator against Davies's administrator, widow, and heir.**

1. In a Court of Equity, several mortgages, tho' appearing, upon their face, to be for distinct debts, will, under circumstances, be considered as merely additional evidences of, and securities for one original debt.

THIS was a suit in the Superior Court of Chancery for the Williamsburg District, to foreclose several mortgages on lands and slaves. The Bill, amended Bill, answers and Exhibits, presented much controversy between the parties, concerning the amount of the debt. Several orders of account were made; upon the last of which,

be considered as merely additional evidences of, and securities for one original debt.

2. *Quere*, whether it be regular, in a decree for sale of mortgaged premises, to direct the proceeds of such sale to be paid over to the plaintiff, before the sale shall have been confirmed by the Court?

a commissioner reported a statement, shewing a balance due the plaintiff of 127*l.* 5. 9½, with interest thereon, at 5 per centum per annum, from the 13th of January 1804.

JANUARY,  
1820.

Anderson's  
administra-  
tor  
v.  
Davies's ad-  
ministrator,  
widow, and  
heir.

Chancellor NELSON, being of opinion that this balance was the only sum due, and that the several mortgages in the Bill mentioned were not for distinct and different debts, but merely additional evidences of, and securities for, one original debt,(1) decreed, that, unless the defendants should, on or before a day specified, pay to the plaintiff the said sum of 127*l.* 5. 9½, with interest as aforesaid, they should be barred and foreclosed of all equity and right to redeem, &c.; and, in such event, that certain commissioners named in the decree, or any two of them, after giving three weeks previous notice in one of the Norfolk Newspapers, should expose to public sale, by auction, for ready money, the mortgaged premises, or such part thereof as should be sufficient for the purpose, and, out of the proceeds of the sale, pay to the plaintiff his said debt, interest and costs; and the surplus of the said proceeds, if any, after deducting the expenses attendant thereon, pay to the defendant *Fortescue Whittle*, administrator of *Davies*.

The Commissioners reported, that, pursuant to this Decree, they advertised the property for sale; but, the defendant *Whittle* having tendered them the money to be raised by such sale, to wit, \$738 74 Cents, they, with the assent of the plaintiff, received the same, and paid it over to him, as appeared by his Receipt annexed to their Report; to which there was no exception.

The Chancellor confirmed the said Report; and, it appearing thereby, that the plaintiff had received the amount of his debt, interest, and costs, the final decree was that the defendants should pay only the costs incur-

(1) Note. In one of the Mortgages in question, there was no reference to the other two; so that, upon it's face, it did not appear to have been given for the same debt; but the allegations in the answers, and other circumstances, led to a different conclusion.

JANUARY,  
1820.

Anderson's  
administrator  
v.

Davies's ad-  
ministrator,  
widow, and  
heir.

red by him since the rendition of the said interlocutory decree; whereupon, the plaintiff appealed.

After argument, by *Leigh and Stanard* for the appellant, and *Wickham* for the appellees, Judge ROANE pronounced the Court's opinion, as follows.

On the *merits*, the Court has no hesitation in affirming the Decree. Doubts are entertained, however, whether it was regular, in this case, to direct the proceeds of the sale of the mortgaged land to be paid over to the appellant, before the said sale was confirmed by the Court. This question may be considered hereafter, if it shall occur, before a fuller Court.

Decided,  
Jan. 29th,  
1820.

### Boggess against Boggess.

1. If the declaration in detinue do not contain a demand, "that the defendant render to the plaintiff," the property sued for; yet, after verdict on the plea of *non detinet*, judgment ought not to be arrested.

THE declaration in this case was as follows:—"Loudoun County, to wit: *Robert Boggess* complains of *Henry Boggess*, in custody, &c., of a plea for this that plaintiff was, on the       day of       , in the year 1814, at the County aforesaid, entitled to, and possessed of, negro slaves, *Lett* of the price and value of \$500, *Jane* of the price and value of \$500, &c., as of his proper goods and chattels; and, being so entitled, said slaves of the price and value aforesaid, came to the possession of defendant afterwards, to wit, on the       day of       in the year       , at the County aforesaid; yet the defendant, not ignorant of the premises, the said slaves, of the price and value aforesaid, refused to deliver up to plaintiff, tho' required so to do, but the same detains, to the damage of the plaintiff \$2000; therefore he brings suit."

The plea was *non detinet*, upon which a general verdict was found for the plaintiff in the usual form.

The defendant prayed that judgment be arrested, 1st, because the declaration did not demand the slaves for which the Jury had given their verdict; 2dly, because the declaration and proceedings thereon were wholly er-

renewal, illegal, and insufficient to enable the Court to render a judgment in favour of the plaintiff.

The Court, nevertheless, overruled these objections, and entered judgment according to the verdict; whereupon the defendant appealed to this Court, by which that judgment was affirmed.

JANUARY,  
1820.

*Bogges*  
v  
*Bogges.*

### Walker against Laverty and Gantley. \* Decided, Jan. 31st, 1820.

LAVERTY and GANTLEY merchants and partners, brought their action of debt in the Superior Court of Henrico County, on a protested inland bill of exchange, against "*John C. Walker, of the firm of Walker & Co.*" a citizen and inhabitant of the said County; charging in the declaration, that the bill was drawn by the said *Walker & Co.* on the 26th day of March 1816, at New-York, "to wit, at Henrico aforesaid, and within the Jurisdiction of the Court," according to the use and custom of Merchants, (the name of the said *Walker & Co.*, by the hand of the said *John C. Walker*, one of the partners as aforesaid, being thereto subscribed,) for the sum of \$343 88, value received; that the plaintiffs presented the said Bill to Messrs. *Coe & Marsh*, the drawees, at New-York, on the day of , in the year aforesaid, and requested them to pay it, which they refused to do; whereupon it was protested by a Notary Public for the City of New-York, on the 30th of September 1816; of which the said *Walker & Co.* then and there, to wit, at Henrico aforesaid, had notice; whereby, and by virtue of the Act of Assembly in such case made and provided, action accrued, &c. against the said *Walker & Co.*, &c., in the usual form of a declaration against a mercantile company.

1. If the drawer of a protested bill of exchange, being applied to, in behalf of the holder, for payment, acknowledge the debt to be just, and promise to pay it; saying nothing about his having received notice; the holder, in an action of debt upon the bill, against such drawer, is not bound to prove that notice was given him of the protest.

The defendant pleaded *nil debet*.

On the trial, he required proof of notice of protest for non-payment of the bill, whereupon the plaintiff introduced a witness, who proved that he applied to the de-

JANUARY,  
1820.

Walker

v.

Laverty and  
Gantley.

pendant *John C. Walker* for payment of the said bill; that the defendant acknowledged *that the debt was a just one, and said he would pay it; and that nothing was said in that conversation as to his receiving notice or not.* The defendant thereupon moved the Court to instruct the Jury, that, unless the said acknowledgment was made with a knowledge of all the facts of the case as to the laches of the holders of the said bill, the said evidence of the acknowledgment was not to be received; which opinion the Court refused to give, and instructed the Jury that such acknowledgment was a *waiver of all notice.*—The defendant filed a bill of exceptions; and, a verdict and judgment being rendered against him, he obtained a *Supersedeas* from a Judge of this Court; contending, in his petition, that the Superior Court erred in not giving the instruction to the Jury requested by him; and referring to *Blesard v. Hirst*, 5 Burr. 2672; *Goodall & others v. Dolley*, 1 Term. Rep. 712; and 12 East 38.

After argument by *Bacchus* for the plaintiff in error, and *Upshur contra*, the Court affirmed the Judgment.

Decided,  
Feb. 4th,  
1820.

### Backus against Taylor.

1. It is not necessary, in the declaration for covenant broken, to recite the whole of the agreement, but only to describe substantially the material parts as to which breaches are alledged.

IN this case the declaration was in the following words:—

“ Superior Court, Botetourt County, to wit; *Charles Taylor* complains of *George Backus*, in custody, &c., of a plea of covenant broken; for this, that, whereas, by certain articles of agreement, made and entered

☞ See *Macon v. Crump*, 1 Call 575; *Buster's ex'or v. Wallace*, 4 H. & M. 82.

2. In Covenant upon an agreement of lease, which, besides the stipulation to pay the rent, contained other clauses, binding the lessee to board the lessor and wife part of the term, and to return the premises uninjured, the declaration described so much of the agreement as related to leasing the property and paying the rent; charging the defendant with having broken the covenant generally, and particularly in failing to pay the rent; but said nothing about the other stipulations. It was decided that this was not a substantial variance.

FEBRUARY,  
1820.

Backus  
v.  
Taylor.

“ into, on the 24th day of May 1816, at the parish of  
“ in the County aforesaid, and within the jurisdiction of  
“ this Court, between the said *Charles Taylor* of the one  
“ part and the said *George Backus* of the other part, seal-  
“ ed with their seals and bearing date the day and year  
“ aforesaid, and to the Court now here shewn; by which  
“ he the said *Taylor* did agree to rent to the said *George*  
“ *Backus* his establishment at the Yellow Springs, to-  
“ gether with what furniture he could spare, and his cook  
“ *Nathan*; in consideration whereof, the said *George*  
“ *Backus* did agree to pay unto the said *Taylor*, on the  
“ first day of September next ensuing, the sum of six  
“ hundred dollars current money of Virginia; by virtue  
“ of which said articles, he the said *Backus* did enter  
“ upon and take possession of the establishment of the  
“ said *Taylor* at the Yellow Springs:—and the said *Tay-*  
“ *lor* in fact says, that, although he hath, well and faith-  
“ fully, according to the tenor and effect of the said ar-  
“ ticles of agreement, performed and kept all and singu-  
“ lar the covenants in the articles aforesaid, above speci-  
“ fied, on the part of the said *Taylor* to be observed; yet  
“ the said *Backus* on his part hath not performed, ac-  
“ cording to the tenor and effect of the said articles of  
“ agreement, the covenants in the articles aforesaid,  
“ above specified, on the part of the said *Backus* to be  
“ performed. And the said *Taylor* saith, that the said  
“ *Backus* hath not kept his said Covenant made by him  
“ to the said *Taylor*; that he hath not paid the said sum  
“ of money, which he agreed to pay; to wit, six hundred  
“ dollars; at the time appointed, to wit, on the first day  
“ of September next ensuing; neither hath he paid the  
“ same before, or since, though often requested; but the  
“ same to pay he hath hitherto altogether refused, and  
“ still doth refuse; whereupon said *Taylor* saith he is  
“ prejudiced, and hath damage to the value of     , and  
“ therefore he brings his suit.”

The defendant craved *Oyer* of the articles of agreement,  
which were as follow:—“ Articles of agreement made  
“ and entered into this 24th day of May 1816, between

FEBRUARY,  
1820.

Backus  
v.  
Taylor.

“ *Charles Taylor* of the one part and *George Backus* of  
“ the other part, witness, that the said *Charles Taylor*  
“ doth rent to the said *George Buckus*, for the approach-  
“ ing season, his establishment at the Yellow Springs in  
“ the County of Montgomery, together with as many  
“ beds and furniture as the said *Taylor* can spare, also as  
“ many dishes, plates, cups and saucers, knives and forks,  
“ and kitchen furniture as he can spare from the use of his  
“ own house, and his cook *Nathan*. In consideration of  
“ which, the said *Backus* engages on his part to keep the  
“ best accommodations for visitors; is to board the said  
“ *Taylor* and his wife during such part of the season as they  
“ may stay, and furnish them with the shed room of the  
“ framed house next the dining room; is to return at the end  
“ of the season all articles of furniture belonging to said  
“ *Taylor*, in as good condition as when received, natural  
“ wear excepted, and to make restitution for any that  
“ may be lost or destroyed; is not to suffer any of the  
“ trees standing in the yard around the Springs to be  
“ cut or injured, or suffer any of the buildings to be un-  
“ necessarily abused or injured; and, on the first day of  
“ September next, is to pay unto the said *Charles Taylor*  
“ the sum of six hundred dollars in current money of  
“ Virginia. For the true and faithful performance of  
“ this agreement, we bind ourselves, our heirs &c., each  
“ to the other, in the sum of twelve hundred dollars.—  
“ Witness our hands and seals the date aforesaid.”

The defendant demurred generally to the declaration; which demurrer being overruled on argument, he pleaded that he had not broken his covenant. At the trial, the plaintiff offered the said articles of agreement as evidence to the Jury, to which the defendant objected on the ground that the said writing was not the same described in the declaration; but the Court, being of opinion that there was no substantial variance, permitted it to go to the Jury; to which opinion the defendant excepted.—Verdict and Judgment for the plaintiff for \$373 58 cents, damages and Costs; from which the defendant appealed to this Court, where the same was affirmed.

## West's executor against Logwood.

Decided,  
Feb 14th,  
1820.

GEORGE M. WEST executor of *Robert West* deceased, presented a Bill to the Chancellor of the Richmond District, for an Injunction to stay proceedings on a judgment at law obtained by *Thomas Logwood* against him, on a bond pretended to have been executed by his testator *Robert West*, for \$2481 97, which the Complainant believed to be counterfeit; that the defendant *Logwood* by his answer might set forth particularly, the consideration for which the said bond was given; that a new trial of the cause might be directed, in which the complainant might be permitted to plead *non est factum*, and thereby put the question of fraud in issue; or that an issue on the same point might be made up, and tried at the bar of any tribunal convenient to the parties; and for general relief.

The grounds of Equity stated in the Bill, were, that, “on the trial at law, on the common plea of *payment*, put in by the complainant’s counsel, some *circumstances* transpired, which, for the first time, awoke suspicions of fraud; and then, on a minute examination of the paper, the complainant was convinced that the signature of his testator’s name thereto was not genuine;” that, under this conviction, after the jury had rendered a verdict for the plaintiff, he moved the Court for a new trial, which was denied, and judgment rendered according to the verdict; that, execution being forthwith sued out, the Complainant gave a forthcoming bond, with a view to gain time to make himself better acquainted with the transactions between his testator and the said *Logwood*, and to detect the fraud if any had been attempted by the latter; on which forthcoming bond, execution had lately been awarded:—that the plaintiff was now firmly convinced that the said bond for \$2,481 97 cents was not the genuine deed of his testator;—

cions of fraud were for the first time, excited on the trial at law. and then, on a minute examination of the paper, he was convinced that the signature of his testator’s name thereto was not genuine; which conviction was strengthened by other circumstances, some of which were known to him before the trial, and some afterwards.

1. Under circumstances, inducing suspicions, that a bond (on which a judgment at law had been obtained against an executor,) was counterfeit, or fraudulent; upon a Bill filed by the Executor, relief was given in equity, by directing an issue to try whether the bond in question was the deed of the testator, or not; and, if so, what was the consideration on which it was founded:—and this, notwithstanding the trial at law was upon the plea of *payment* put in by Counsel, and a new trial moved for by the complainant was refused by the Court; it being alledged in the bill that the complainant’s suspicions



FEBRUARY,  
1820.

West's  
executor  
v.  
Logwood.

1st. Because the said *Logwood*, before the institution of his suit at law, stated to the complainant that he held such bond, and requested payment, but always declined shewing the bond, (alleging that he had it not with him,) tho' requested to do so:—

2d. Because, when the said *Logwood* made application for payment, he stated expressly that the bond in question, and another which he also held against the estate of the said *Robert West*, were both executed on account of a debt from the said *West* to him, arising from a difference in exchange of lands; which assertion appeared to be incorrect; the said bond for \$2481 97 cents containing *internal evidence* that it was given "in full of all open accounts" between the parties, with some particular specified exceptions; and the written agreement, concerning the said exchange of lands, demonstrating that the said bond could not have been given on *that* account.

3d. Because the said bond was attested by three witnesses, one of whom, *Moses Jackson*, by his *affidavit* (exhibited with the Bill,) denied that he ever attested it, or any other transaction between the said *West* and *Logwood*; and another, *Thomas Churchman*, was guilty of such gross inconsistencies in his testimony, as a witness to the other bond, (against which the present complainant had pleaded *non est factum*,) as to destroy all confidence in his credit; and, altho' the Jury found that issue for the plaintiff *Logwood*, and the Court refused to set aside the verdict, yet the complainant had reason to believe that it was not because the Jury or the Court put any confidence in the witness, but because the bond was executed for the amount of an instalment, which was admitted on all hands to be due on account of the exchange of lands:—

4th. Because the complainant could not find among his testator's papers any trace of any transaction between the said *Logwood* and him, on which the said bond for \$2481 97 cents could have been founded:—and 5th, because the complainant verily believed, from his knowledge of his testator's hand writing, that his signature to the said bond was not genuine; and he, the complainant,

had no manner of pecuniary interest in this transaction, but was actuated solely by the desire of doing justice to his testator's estate and family.

FEBRUARY,  
1830.

West's  
executor  
v.  
Logwood.

Chancellor TAYLOR refused the injunction, which afterwards was granted by Judge CABELL, with the concurrence of Judge COALTER.

LOGWOOD then answered the Bill, denying all the equity alledged, and declaring that the bond in question was genuine, being given in consideration of two thousand dollars, cash lent by him to the said *Robert West*, and a balance due him on sundry other transactions between them; that *Moses Jackson*, the witness to the said bond, was a different person from the man of the same name who denied that it was attested by him; that *Thomas Churchman* also actually attested the execution thereof, and was a man of a fair reputation, tho' attempts were made on the part of the complainant to brow-beat and surprise him, whilst under his examination as a witness; in which the complainant in some degree succeeded, but not farther than is frequently the case, on such occasions, with persons of undoubted veracity.

Many depositions and exhibits were filed on both sides.

Chancellor TAYLOR dissolved the Injunction, and afterwards refused to re-instate it; on which occasion he pronounced the following opinion.

"I shall consider this case as standing before me upon a motion to re-instate the Injunction, which at the last term was dissolved without any attentive examination of the record, that it might remain under the control of the Court in vacation."

"The first question to be settled is, how far this Court has a right to interfere under the *circumstances*, in this case, after a judgment at law. If this question be with the plaintiff, the merits of the case stand next in order; but if this question be in favour of the defendant, the Court (I should suppose) has no more right to look into the merits than it has to be influenced by it's knowledge of the character of the defendant."

"This question leads to the Bill, in which, the circumstances relied upon as sufficient for the interference this of

FEBRUARY,  
1820.

West's  
executor  
v.  
Logwood.

Court, are these; "that, on the trial, some circumstances transpired, which for the first time awoke suspicions of fraud; and then, on a minute examination of the paper, your Orator was convinced that the signature of his testator's name thereto was not genuine; that, under this conviction, after the Jury had rendered a verdict for the plaintiff, he moved the Court for a new trial of that cause, and a continuance of the other:—the continuance was granted, but the new trial was denied, and judgment rendered according to the verdict; that, an execution being forthwith sued out, your Orator gave a forthcoming bond, with a view to gain time to make himself better acquainted with the transactions between the testator and the said *Logwood*, and to detect the fraud if any had been attempted by the latter:—on this forthcoming bond, also, execution has lately been awarded."

"These circumstances are to be considered as if so much of the Bill stood upon a *demurrer*: for I understand it to be the law of this Court, as well as the law of this land, that, if a party has a *plain and adequate remedy at law*, he shall not be relieved in this Court. *Vide* 1st and 2d. ch. of the text of Mr. *Fonblanque*, and his very able commentaries thereupon. And, upon the authority of this rule, it follows that a party that *might defend himself at law*, shall not come here for *relief*; unless, from circumstances which he could not reasonably control, he was unable to do it at law. *Vide* the same authorities. In other words, as the correctness of these rules will not be questioned, so long as the trial by Jury shall be preferred, it may safely be affirmed to be the law, that every controversy which can be fairly and fully settled *there* by reasonable attention, shall not be reviewed or settled *here*; and more especially, in a case where all the means for delay afforded by the law, have been resorted to in the first instance. *Vide* the same authorities."

"Let the case before us, then, be examined by this rule. Could it have been fairly and fully settled at law? The answer is at hand; that it might, unless from cir-

circumstances which the plaintiff here could not have reasonably controlled there. What were these circumstances? Why, besides those before stated, it is also alleged in the Bill that the plaintiff was not acquainted with the affairs of his testator, and therefore had no reason to doubt the fairness of the claim, and went to trial upon the common plea of payment, put in by his counsel. But, if the plaintiff had taken *oyer* of the bond, on which he was sued at law, which was his right if not his duty, he would not have been bound to plead until the bond had been filed:—so that he might very easily have controlled those circumstances which led to that plea, and might easily have been prepared for trial upon the plea of *non est factum*:—and therefore it is not competent for him to complain, since the injury of which he complains was produced by his own want of reasonable attention.”

FRANKLIN,  
1820.

West's  
executors  
v.  
Logwood.

“ But, if it be not so, then, according to his own showing, he was apprised of the supposed fraud in relation to the name of his testator, in due time, and might have availed himself by a proper defence, at law, in the motion for a new trial, which was made and denied. He was then in the proper Court, with the legal means in his hands. It was competent to that Court, upon his own affidavit, disclosing sufficient circumstances, to give him the relief now asked for:—but this Court is asked now to do what that Court might have done. That Court was right, or it was wrong. If it was right, there is an end of the question; and, if it was wrong, the question should have been saved and reviewed upon the *law* side of the *Supreme Court*; for this Court has no right to revise the errors of a Court of law.”

“ These are believed to be plain and correct principles; and if they need any support, it may be found in those cases referred to in 4 *Munf.* 135, by a written argument, by Mr. *Botts*, in support of a petition to the Supreme Court of Appeals, in the case of *Spencer and White v. Wilson*, for an appeal from a decree of this Court.”

FEBRUARY,  
1820.

West's  
executor  
v.  
Logwood.

Besides, the principle seems to be settled, in *Hook v. Nanny and others*, 4 H. & M. 157, that, if a Court refuse a continuance at law that ought to be granted, the question may be saved and the error corrected by an appellate Court, as was done in that case; and this being the law with respect to a continuance, when refused, the same rule is supposed to apply to a motion for a new trial, if it be also refused:—and in *Syme and others v. Montague*, *ibid.* 180, I understand the principle in *Hook v. Nanny and others*, to be applied so expressly:—for my venerable predecessor in that case said, “that if the Court before which the verdict was found, in the action at common law, and in rejecting a motion for a continuance, the Court of Chancery for that reason awarding a new trial would usurp jurisdiction imper-  
“tinently;” and “that if the verdict were contrary to evi-  
“dence, or were found upon insufficient evidence, applica-  
“tion, which ought to have been to the Court where the trial  
“was had, was with like impropriety addressed to the Court  
“of Chancery for such other trial;” and Judge TUCKER  
concurred with him; and Judge FLEMING, who was the  
other Judge that then composed the Supreme Court, (as  
Judge ROANE declined to sit in the case,) said, “that  
“the reasons of the Chancellor for not meddling with the  
“trial, and judgment at law, are cogent and satisfact-  
“ry.” And I am humbly of opinion, that if this be  
the law for Mr. Hook and Mr. Montague, it should also  
be the law for Mr. Logwood, and for all others standing  
in a like situation.”

“It never was, I believe, as represented in Mr. Battis’s  
argument, “that the Country has groaned of late under  
“the harsh and highly penal rule of the Chancery Court;”  
but, if it were so, as that argument was addressed to the  
Supreme Court, from whence the rule complained of was  
derived, as appears in Judge ROANE’s opinion in *Branch  
v Burnley*, 1 Call 147, and by the case of *Terrel v. Dick*,  
*ibid.* 546, I shall make no remark upon it: for I feel very  
confident that the rule, if pursued, like the rule in this  
Court, “never to refuse to hear a motion (within the rule

of Court,) to dissolve an Injunction," would have the like good effect upon the Country."

"The value of this Rule is derived from it's inflexible character: it is known; it is fixed; and never yields to time or circumstances; and I hazard nothing when I say there is not a lawyer at the bar, that would, if consulted, give his consent to part from it. Let the Rule, then, with respect to relief in Chancery, *after a judgment at law*, be as well fixed, as the rule is with respect to motions to dissolve, and it will be as valuable. The reason of the rule, in relation to such motions, is this, that, as the Court is always open to re-instate an Injunction, if dissolved, so the Court, when sitting, should never, within it's rule, refuse a motion to dissolve. The good effect of the rule, is seen in the promptitude of the parties, who, as it never varies, always understand it. The justice of the Country requires that the rule, by which a party shall be let into this Court for relief against a judgment at law, should also be as well known and fixed; and that it should not bend to time or circumstances; unless they were not reasonably to be controlled. The reason of it, to my mind, is obvious; since it is a *legal*, and *not an equitable* right the plaintiff comes here to assert."

"Allow me to say, that rules prescribed by Courts, like those prescribed by the Legislature, should neither conflict with the *Constitution*, nor with the reasonable *convenience* of the people."

"As to the former, it is declared by the 11th section of the bill of rights, that, "*in controversies respecting property, in suits between man and man, the ancient trial by Jury is preferable to any other, and ought to be held sacred.*" Perhaps it may be said, that this section of the bill of rights is not to be infringed; because, if the new trial be granted, the case is to be tried by a Jury again: but the section is not worth reading, if this Court can set the verdict already found aside, which the Court, where it was found, (for aught that appears, for the same reasons,) refused."

FEBRUARY,  
1820.

West's  
executor  
v.  
Logwood.

FEBRUARY,  
1820.

West's  
executor  
v.  
Logwood.

"As to the latter, look at the record, and let the inconvenience and trouble, as well as the expences of the parties, be contrasted with their inconvenience, trouble and expences in going to the dernier resort of the law, for a new trial. In the former case, it is really not a very easy matter to make an estimate; without saying a word as to the effects of the written evidence upon the verdict found under circumstances which satisfied a most intelligent and enlightened Court. In the latter case, if that Court erred, a bill of exceptions, (as in *Hook v. Nanny and others*,) transmitted to the Supreme Court, with the aid of Counsel, put an end at once to all the trouble and expence of the parties, and held "sacred" the verdict, unless by law it should be set aside; and then by law the same cause would be tried again. Surely this is the better course; and one which, with great deference to the opinions of others, I think ought to be pursued, or the decision of the Court of law, as in *Syme and others v. Montague*, ought to be satisfactory; unless the broad ground is to be taken that this Court is not to be satisfied without reviewing every case in it's own way, regardless of the rules of law; against which unauthorised assumption of power, I avail myself of this occasion to enter my solemn protest."

"I have regretted very much to hear some Gentlemen of the Bar say, that they consider the line, as drawn by the case of *Terrel v. Dick*, between the Courts of law and equity, and supported by one uniform course of decision, in the cases of *Turpin administrator of James v. Thomas*, 2 H. & M. 139, *Syme and others v. Montague*, 4 H. & M. 180. *Delima v. Glassel's administrator*, *ibid.* 369, *Kincaid v. Cunningham*, 2 Munf. 1, *The Auditor v. Nicholas*, *ibid.* 31, *Fenwick v. M-Murdo & Fisher*, *ibid.* 244. and *Duvals v. Ross*, *ibid.* 290, removed by the decision in the case of *Price's executor v. Fuqua's administrator*, 4 Munf. 68, and the cases which have followed since.— These cases shall in due time receive my attention. In the case of *Fenwick v. M-Murdo & Fisher*, the PRESIDENT of the Supreme Court, adverting to the cases of *Terrel v. Dick*, *Turpin administrator of James v. Thomas*.

*Morris & Overton v. Ross, Syme and others v. Montague, and Delima v. Glassel's administrator*, said, "the principle settled on solemn argument and due consideration of those cases, ought not now to be disturbed; which is that, where a cause has been once fully heard and decided in a Court of common law having competent jurisdiction of the case, a Court of Equity ought not to interfere, unless fraud or surprise be suggested and proved, or some material adventitious circumstance had arisen which could not have been foreseen or guarded against. The case before us was most properly cognizable in a Court of common law, where it seems to have been thoroughly investigated, and underwent an able and lengthy discussion in all it's parts, and a verdict and judgment was rendered in favour of the plaintiff, to which there was no exception taken, nor was there a motion for a new trial. The Court, without deciding on it's merits, is unanimously of opinion that the Court of Chancery had no jurisdiction of the case."

FEBRUARY,  
1820.

West's  
executor  
v.  
Logwood.

"There is no difference discerned, between the principle settled, upon a review of those cases, in that Court, and that laid down, by this Court, in *Alderson v. Biggers & others*, 4 H. & M. 470, and in *Nicholson and Heth v. Hencock and others*, *ibid.* 491, and which I still think is correct, and that it ought to give the rule in the case before me."

"Let us now turn our attention to the case of *Price's executor v. Fuqua's administrator*, 4 Munf. 68, and to the decisions in the other cases since, to see if those Gentlemen, to whom I have referred, were correct in supposing the decision in *Terrel v. Dick*, (recognised by the cases referred to,) overruled. The principal cases, since *Price's executor v. Fuqua's administrator*, in which the question of jurisdiction was presented, are *Wall's executor v. Gressom's distributees*, 4 Munf. 110, *Spencer and White v. Wilson*, *ibid.* 130, *Noland v. Cromwell*, *ibid.* 155, and *Wilkins v. Woodfin administrator of Pearce*, 5 Munf. 183:—and, first, as to the case of *Price's executor v. Fuqua's administrator*."



FEBRUARY,  
1820.

West's  
executor  
v  
Logwood.

"This was a decision in the *absence* of the appellee; and therefore, as I understand the course of the Court, it would not be considered as authority there: it should not be considered so elsewhere; or, in other words, it gives the rule only in that particular case."

"In the next case, of *Wall's executor v. Gressom's distributees*, I understand Judge ROANE in delivering the opinion of the Court, as I do in *Terrel v. Dick*; and the decision being founded upon "*the circumstances of the case*," confines it's authority, I believe, to that case only."

"In the next case of *Spencer & White v. Wilson*, it does seem to me, I admit, that the decision conflicts with the rule in *Terrel v. Dick*, and in the cases which followed, down to the decision in the case of *Duvals v. Ross*.—The conflict seems to be in this, that, in these cases, the plaintiffs in this Court were denied relief in the Supreme Court, upon the ground taken by Judge ROANE in *Branch v. Burnley*, and by the Court in *Terrel v. Dick*. In *Branch v. Burnley*, that very distinguished Judge said, "I hold it to be a clearly established principle "that a judgment of a Court of common law, given on a "legal question shall never be corrected or disturbed in "Equity upon grounds which were proper for the common law Courts, and which, therefore, we must suppose "such Court to have decided upon; unless the applicant "to the Court of Equity can shew some particular circumstances to have taken place, operating as an impediment to his availing himself of those grounds upon "the trial at law."

"In *Terrel v. Dick*, Judge ROANE, on a like question, again said, "in order to save time, I beg leave to refer, "in support of this opinion, to the observations I used "upon this point, in the case of *Branch v. Burnley*, and "to remark that, upon mature reflection, since, I have "not seen cause to *change* my opinion upon the subject."

In the case of *the Auditor v. Nicholas*, Judge BROOKE said, upon a like point, that, "the doctrine is well established in this Court, that decisions at law can not "be revised in a Court of Chancery upon the mere "ground of error in the law Court, nor upon circum-

“stances of which that Court had cognizance, unless the complainant can make a competent excuse for having failed to defend himself at law.”

FEBRUARY,  
1820.



West's  
executor  
v.  
Logwood.

“In the case of *Duvals v. Ross*, upon a like point, Judge CABELL said, “I can not perceive in this case any ground on which *Ross* can found his claim to the interference of a Court of Equity. The controversy between the parties, a mere contest about the terms of a contract, was properly cognizable before a Court of law. It was regularly submitted to a Jury, who fully investigated and fairly decided it. *Ross* himself complains neither of surprise, of the absence of witnesses, nor of any other circumstance to impeach the fairness of the trial: he does not state the subsequent discovery of testimony unknown to him at the trial; and, altho’ he calls on the *Duvals* to answer as to certain facts which he alledges were known to them, yet he no where intimates that these facts were known to them *only*, so as to be incapable of other proof, and thus to authorise a resort to a Court of Equity for the purpose of extorting a disclosure. In fact, the only ground on which he himself sets the subject is, that the judgment is oppressive and unjust. What is this but, under the specious pretext of equity and justice, to give to the Court of Chancery the enormous power of revising and controlling verdicts and judgments in all cases whatsoever? a power dangerous in itself, incompatible with the genius of our government, and utterly denied by our laws.”

“In this case, also, Judge FLEMING said, that “all the facts and circumstances stated in the bill *were*, or *might have been*, given in evidence on the trial at law;” so that four Judges, in five, concurred with this Court in *Fenwick v. McMurdo and Fisher*.”

“But, in the case of *Spencer and White v. Wilson*, now the subject of consideration, relief was afforded, tho’ no reason was assigned in the bill for not having made their defence at law, as seems to me to be required by all of the foregoing opinions; and without a proper case being made by the bill for a discovery, as was said by Judge

FEBRUARY,  
1820



West's  
executor  
v.

Logwood.

CABELL, in *Duvals v. Ross*, to be necessary; and still it does seem to me that the Court did not mean to be understood, in that case, as conflicting with the question of jurisdiction, settled in *Terrel v. Dick*, and in the numerous cases which have followed. For, in the next case of *Noland v. Cromwell*, Judge FLEMING said, in giving the opinion of the Court, in which, also, he said that Judge ROANE, tho' absent, concurred, that "altho' a party may be let into a Court of Equity, on grounds which he could not have used on the trial of a *Caveat*, and which, in fact, make another case, (in reference to that which he might have availed himself of on such trial;) or upon a case suggesting and proving that he was prevented by fraud or accident from prosecuting his *caveat*; he is not to be sustained in the Court of Equity, on such grounds as were, or might have been brought forward on the trial of the *caveat*." So that I consider the rule established by this decision as a complete recognition of the rule, upon the principle laid down in the case of *Fenwick v. M. Murdo and Fisher*, and in all those cases referred to in that decision: for I am unable to discern the difference if any exists; since, in both cases, whether at law upon a *bond* or *covenant*, or in a *caveat*, the party coming here for relief against a decision there, must, upon principle, be able to *state, and to prove*, why he did not avail himself *at law*; and so, as to a decision at law in any other action, from a common action of slander up to a Writ of right. And if, as Judge BROOKE said in the case of the *Auditor v. Nicholas*, he "can make a competent excuse for having failed" to do it, this Court will sustain him. And in *Noland v. Cromwell*, Judge FLEMING, as to Jurisdiction, remarked that, "if the solemn decisions of this Court upon the point, were even replete with error, that error, upon general principles, had better be acquiesced in, than corrected at this late day;" and to this effect the same venerable Judge spoke in the case of *Fenwick v. M. Murdo and Fisher*: and herewith also agrees that distinguished author Judge BLACKSTONE, that "it is an established rule to abide by former precedents where the same

“ points again come in litigation; as well to keep the  
 “ scale of justice even and steady, and not liable to wa-  
 “ ver with every new Judge’s opinion; as also because,  
 “ the law in that case being solemnly declared and deter-  
 “ mined, what before was uncertain, and perhaps indif-  
 “ ferent, is now become a permanent rule, which it is  
 “ not in the breast of any subsequent judge to alter or  
 “ vary from, according to his private sentiments: he  
 “ being sworn to determine, not according to his own  
 “ private judgment, but according to the laws and cus-  
 “ toms of the land; not delegated to pronounce a new  
 “ law, but to maintain and expound the old one.” And  
 so are the principles on which this Court acts, as well  
 settled. *Vide* the case of *Bond v. Hopkins* 1 Sch. and  
 “ *Lefr.* 428-9, for the opinion of Lord *Reddesdale* in this  
 “ respect.”

FEBRUARY,  
1820.

West's  
executor  
v.  
Logwood.

“ The same distinguished author, speaking of the *der-*  
*nier* resort of Justice in England, says, “ their sentence  
 “ is final, decisive, irrevocable: no appeal, no correction,  
 “ not even a review can be had: and to their determina-  
 “ tion, whatever it be, the inferior Courts of Justice  
 “ must conform; otherwise the rule of property would be  
 “ no longer uniform and steady.” 1 *Tuck. Bl.* 11, 69.—  
 And so here: for, unless it be so, a *dernier* resort of jus-  
 tice would be a very great evil, instead of a benefit to the  
 community. So that it is the duty of this Court, in con-  
 formity with the established law, so far as the deci-  
 sions of the *Supreme Court* are understood, to pursue them.”

“ The only difficulty, at any time, upon this subject,  
 so far as I am informed, is to understand how the law  
 there is settled. That this difficulty should sometimes  
 exist, is not very strange; since a difference of opinion  
 now and then happens, among the Judges of that Court,  
 in relation thereto. But so far as the law is understood  
 to be settled, I believe, it is conformed to by all the  
 Courts below with peculiar pleasure. But if it be not  
 settled at all, the settlement of it must, from the nature  
 of our institutions, begin in the Courts below; and, in  
 such cases, each Judge must, of necessity, do it in his  
 own way:—and so he must, if there be a *contrariety* of de-

FEBRUARY,  
1820

West's  
executor  
v.

Logwood.

cisions in *analogous* cases; or if the law be settled, as Judge FLEMING said in *Duvals v. Ross*, "according to a *variety* of decisions of this Court," each Judge must still act for himself in like manner."

- "The next and last case referred to, of *Wilkins v. Woodfin adm'r. of Pearce*, may be considered as placed upon the ground of *Price's ex'or. v. Fuqua's adm'r.*, as it was a case without counsel for the appellee."

"There are some other cases, since the case of *Price's executor v. Fuqua's administrator*, that bear a strong likeness to it, which have not been brought into view, and as to which, I do believe, so far as I understand them also, the Judges of the Supreme Court did not mean to remove the *line*, as drawn by the *many solemn decisions* of that Court, between the Courts of *law* and *equity*, from *Terrel v. Dick* down to *Noland v. Cromwell*: for, in none of the cases that are supposed to conflict with that *line*, has it been said by a single Judge of that Court, that any one of them is not law, as is sometimes said in England, *Vide 1 Tuck. Bl. 69.*"

"One general remark more, upon all that class of cases, which are said to conflict with Judge ROANE's opinion in *Branch v. Burnley*, and with the Court in *Terrel v. Dick*, and with all the other cases decided in conformity thereto, down to *Noland v. Cromwell*, is this, that in not a single instance did the question occur as to the jurisdiction of the Court; and, in every instance, the Court seems to have relied upon the *merits*, without even looking at that question; so that I consider it as in no manner disturbed; and in this I am supported, upon principle, by the decision of the Court in *Noland v. Cromwell.*"

"If in this view of the subject I am correct, this Court was so in *Alderson v. Biggers*, 4 H. & M. 470, and in *Nicholson and Heth v. Hencock and others*, *ibid.* 491, which, being now reviewed, are approved and referred to, so far as the question of jurisdiction was discussed and settled, as a part of my opinion in this case."

"But, if I have erred in this view, then it is for the Supreme Court to say whether the *line* drawn between the Courts of *law* and *equity* by the decision in *Terrel v. Dick*, and approved by the Court in *Fenwick v. McMurdo*

& *Fisher*, upon a review of all the like cases which had been decided in the mean time, be removed or not.”

FEBRUARY,  
1820.

West's  
executor,  
v.  
Logwood.

“Before I dismiss this subject, let me notice the conduct of *Mr. West*. On the trial at law he suspected, for the first time, that the name of his testator to the bond in question, was not genuine:—but, after a verdict, he was denied a new trial:—why? because, I suppose, the Court was satisfied:—and with that decision this Court must be satisfied. unless he could bring himself within the rule laid down by all the Judges in some of the cases before referred to. What did he do? Why, instead of coming off to this Court, to *state and prove* if it were true, how he had not been able, from some reasonable cause, to present his case to the Court of law for a new trial, and therefore asked it here, before an execution should be levied, to save expences to the estate of his testator, he submitted to an execution, a forthcoming bond, and a judgment thereon; and, thus, having availed himself of all the delays of the law, comes here, representing this conduct as necessary “*to gain time to make himself better acquainted with the transactions between his testator and the said Logwood;*” and yet, he does not state, in any part of his bill before me, the discovery of a single circumstance, in relation to the transaction, since that trial, so far as I understand that bill. He is not therefore, as it seems to me, within the rule prescribed to this Court; since the circumstances now disclosed were known to him then, and were either brought to the view of the Court of law, or they *might* have been:—and, upon *authority*, if they *were not*, it should be accounted for.”

“Upon this view of the subject, I can not consent to reinstate the injunction, which is now to be considered as having been dissolved upon the ground that it should not have been granted.”

From this decree the complainant was allowed an appeal by order of a Judge of this Court. In his petition he remarked, 1st, that his case, *as stated in his bill*, was properly *relievable in equity*; since, if he *might* have made the matters, in the bill stated, the ground of a de-

FEBRUARY,  
1820.

West's  
executor  
v.  
Logwood.

fence at law, (and it is not denied that he *might*,) the reasons set forth by him for not having availed himself of such defence at law, are *sufficient in themselves*, and are proved to be just and true, by the proofs in the cause and all the circumstances of the transaction:—2d, that, on the merits and on the evidence, the case was precisely such an one, as that the Court should have directed a new trial of the suit at law, with liberty to the complainant to plead that the bond was not the deed of his testator.

The following was the opinion of this Court.

The Court is of opinion, that the Court of Chancery erred in dissolving the Injunction in this case, without having directed an issue, to try whether the bill penal in question was the deed of *Robert West* the appellant's testator, or not; and further, to ascertain, if it be found to be his deed, what was the *consideration* on which it was founded.

The Decree is therefore reversed with costs, and the cause is remanded to the Court of Chancery, to have such issue directed, and the cause proceeded in to a final decree.

Decided,  
Feb. 15th,  
1820.

### Woody against Flournoy.

1. In *assumpsit* upon a written agreement, an express promise ought to be laid in the declaration: a mere recital of the writing, tho' a true copy, is not sufficient. See *Cooke v. Simms*, 2 Call, 39. S. P.

THIS was an action of *assumpsit* in the Superior Court of Chesterfield County, instituted in March 1814. by *William Flournoy* against *Samuel Woody* and *Cornelius Buck* late co-partners in working *Railey's* coal pits.

The declaration contained two Counts; the first, a general *indebitatus assumpsit* for the hire of five slaves of the plaintiff, for which the defendants on the 1st day

2. The declaration was upon a general *indebitatus assumpsit*, for the hire of five slaves, for which the defendants, being co-partners, promised, on the 1st of January 1811 to pay the plaintiff the sum of \$350, when they should be thereunto afterwards required:—the plaintiff could not recover upon a writing signed by one of the defendants, certifying that he had hired of the plaintiff five slaves at the price of \$350, and that this should entitle the plaintiff to the other defendant's bond for the same, payable on the 1st of January 1811.

FEBRUARY,  
1820.

Woody  
v.  
Flournoy.

of January 1811, promised to pay him the sum of three hundred and fifty dollars, when they should be thereunto afterwards required:—the second a special Count, as follows; “and whereas, on the 13th day of January 1810, at the parish and County aforesaid, the said defendant *Samuel Woody*, acting for and on behalf of himself and the said defendant *Cornelius Buck*, then partners as aforesaid in working *Railey’s* coal pits in the said County of Chesterfield, made an agreement in writing with the said plaintiff, in these words and figures, to wit:—“This is to certify that I have this day hired of *Dr. William Flournoy* five hands at the price of three hundred and fifty dollars, their time insured by their master; and the said hands to work in *Martin Railey’s* coal works the present year; to be cloathed as usual; and this shall entitle *Dr. Flournoy* to *Cornelius Buck’s* bond for the same, payable on the first day of January 1811;” which agreement is signed by the said *Woody*, and dated the day and year in this Count first above mentioned; and the plaintiff avers that he did every thing which on his part he was bound by the said agreement to do; by virtue whereof, and the above recited agreement, the said plaintiff became entitled to demand of the said defendants co-partners as aforesaid, the said *Cornelius Buck’s* bond for the said sum of three hundred and fifty dollars, payable to the said plaintiff on the said first day of January 1811; yet the said defendants have not fulfilled or performed their agreement aforesaid, in this, that they or either of them (although they have been often thereto required, and, particularly, on the            day of            in the year            , and again on the            day of            in the year            ,) have not delivered the said plaintiff the said *Cornelius Buck’s* bond, payable to the plaintiff on the 1st of January 1811, but have altogether refused so to do; and also in this, that the said defendants, or either of them, did not return the said negroes at the expiration of the term of their hiring, cloathed as usual:—by reason whereof, and of the breach by the



FEBRUARY,  
1820.

Woody

v.

Flourney.

“ said defendants of their promise in the first Count  
“ herein above set forth, the plaintiff saith he is damaged  
“ six hundred dollars, and thereof he bringeth suit.”

The defendants pleaded, *separately, non assumpsit.*

On the trial, the Jury found a special verdict, that, on the first day of January 1808, certain articles of co-partnership were made and entered into between the defendant *Woody* and the defendant *Buck*, for working in partnership certain coal mines in the County of Chesterfield called *Ranley's* coal pits; which articles were found *in hæc verba*; that, on the 13th of January 1810, the plaintiff hired five slaves to work at the said coal pits, which hiring and the terms thereof were evidenced by a writing of the same date last aforesaid, signed by the defendant *Woody*, and then delivered to the plaintiff, which writing (being the same recited in the declaration,) was also found *in hæc verba*:—that, before the institution of this suit, to wit, *early in the year 1813*, the plaintiff demanded of the defendant *Buck*, his bond for the amount of the hire of the plaintiff's slaves in the said writing mentioned; with which demand he refused to comply:—that, before the institution of this suit, to wit, in the spring of the year 1813, the plaintiff demanded of the defendant *Woody* that he would execute and deliver to him, his own bond for the amount of the said hire, with which demand he refused to comply:—that, in the year 1811, the plaintiff told a witness, that he had the year before hired five hands to the defendant *Woody* for the defendant *Buck*; and that they had been returned naked; but that he did not blame *Woody* therefor; for that he looked to *Buck* alone:—that, during the year 1810, for which the said slaves were hired as aforesaid, they once ran away from the said pits, and went home to the plaintiff, who brought them back to the said coal-pits without delay, and delivered them to *Woody*, who being about to correct them for running away, the plaintiff objected to his doing so, saying that *Woody* should have nothing to do with the said slaves; for that he the plaintiff did not look to him but to *Buck* for the hire thereof; that, during the same year 1810, two other per-

sons hired slaves to *Woody* for the use of the said *Rail-ey's* coal-pits, and received from him similar orders on *Buck* for his bonds for the amount of hires respectively; and that, on presenting such orders to *Buck*, he gave his bonds accordingly, which he afterwards paid off; to wit, during the year 1811, or early in the year 1812: that the partnership aforesaid, between the said defendants, was dissolved in the month of December 1810, but no public notice of such dissolution appeared to have been given by them, or either of them:—that, during the year 1810, orders for bonds for hand-hire were frequently drawn by *Woody* on *Buck*, which orders were similar to those before mentioned; and that, until the latter part of the year 1810, those orders were uniformly complied with by *Buck* by his executing and delivering bonds according thereto; that *Buck* became embarrassed in the year 1811, and utterly insolvent in July or August of 1812.

FEBRUARY,  
1820.

Woody  
v.  
Flournoy.

The verdict concluded in the usual form; finding conditionally for the plaintiff, and assessing his damages to \$350, with legal interest thereon from the 1st day of January 1811 'till paid, &c.

The Superior Court gave Judgment for the plaintiff: from which the defendant *Woody* appealed.

*Samuel Taylor* for the appellant.

*Leigh* for the appellee.

Judge ROANE delivered the Court's Opinion.

The Court is of opinion that the second Count in the declaration is defective in this; that it does not aver that the appellant and his partner *promised* that the appellee should receive the bond of *Cornelius Buck*, but only sets out the writing in which such promise is alledged to be contained, as in the case of *Cooke v. Simms* in this Court.<sup>(a)</sup> The Court is also of opinion that the appellee is not entitled to recover on the first Count, it being a *general indebitatus assumpsit*; because the special agreement set out in the Verdict does not authorise such a recovery; it not being for the stated sum due for the hires of the negroes in question, but, at most, only binding the appellant and his partner for such damages as might have been assessed for a refusal to furnish the bond afore-

(a) 2 Cal 39.

FEBRUARY,  
1820.

Woody  
v.  
Flournoy.

said. The agreement found, differs from the evidence called for by that Count, also, in this, that the former would have warranted a suit by the appellee *before* the expiration of the year, whereas the case made by the said first Count, pre-supposes the lapse of the said year before the accruing of the Action.

On this ground, the Court reverses the judgment, and enters one for the appellant; without deciding, absolutely, how far, if the said second Count had not been defective as aforesaid, the appellant would have been discharged from his liability by reason of the *laches* of the appellee.


Decided,  
Feb. 18th,  
1820.

Prior and others *against* Kinney's executors.

1. An agreement was made between two unmarried sisters, that the property of the one who should die first, or be first married, should, in either event, belong to the other; in consideration of which agreement, one of them, by a deed of gift executed two days

before her marriage, conveyed all her slaves to her said sister, who, after the marriage, lived partly with her, and partly with her brother; permitting the husband, (who was in embarrassed circumstances,) to have the use of the slaves; except two, whom the donee retained in her own immediate employment, and principally to wait upon herself. This deed, tho' admitted to record on the oath of one of the subscribing witnesses, only, who also swore to the hand writing of another who was dead, was adjudged not to be fraudulent as to the creditors of the husband; notwithstanding a judgment for a debt had been rendered against him, and was unsatisfied, when it was executed, and when the marriage was solemnized.

IN the Superior Court of Chancery for the Stannton District, a Bill was filed by *Jacob Kinney*, setting forth that he obtained a Judgment in the County Court of Kanawha against *Allen Prior* for 106*l.*, with interest from the 25th of April 1801, 'till paid, and costs; that he issued execution thereon the 17th of June 1803, and another execution the 24th of September in the same year; that it appeared by the Sheriff's return on the *first* of these executions, that *Elixabeth Lewis* claimed the negroes on which it was levied; the return on the *second*, was only in these words, "not sold on account of sickness:"—that the claim of *Elizabeth Lewis* was fraudulently set up to screen the property from the execution, being founded on an instrument of writing recorded in

FEBRUARY,  
1820.

 Prior and  
others  
v.  
Kinney's  
executors.

the said County Court, executed by *Peggy* the wife of the said *Prior*, (formerly *Peggy Lewis*, sister of the said *Elizabeth*,) after her marriage with him, and with no other intent, nor for any other consideration, than to screen the property from the payment of his debts; his circumstances being known to be much embarrassed:— that, if the said instrument bore date *before* the marriage, it was so dated to give it the colour of having been *then* executed: that it never was *legally* admitted to record: that *Prior* had always been in possession of the slaves, and claimed them as his own; that they were taxed to him; that *Elizabeth Lewis* did not live with him, nor take any kind of authority over them, except it might be to claim them if taken by any officer for his debts: that they had remained in his possession more than five years before the institution of this suit, and ought now to be considered as his property, in relation to his creditors.

The Complainant prayed that *Allen Prior*, *Elizabeth Lewis*, and *Andrew Donnally* the Sheriff of Kanawha, be made defendants to the Bill; that the said *Prior* and *Lewis* by their answers should say, *upon what consideration* the writing before referred to was executed, and for what purpose; whether it bore date on the day when it was executed, or not; was it before or after the marriage of said *Prior* and wife? what was the date of the marriage? *who* was in possession of the slaves from the time of the said marriage, and upon what terms? that by a decree of the Court the said slaves should be sold for satisfaction of the said judgment, &c.

*Elizabeth Lewis*, by her answer, said that, long before the marriage of her sister *Peggy Lewis* with *Allen Prior*, it was agreed between them, that, which ever of the sisters should happen to die first, or be first married, the property of the one so married or departed this life, should, in such event, belong to and become vested in the surviving or unmarried sister; that witnesses were called upon to attest this mutual agreement; and, in consideration thereof, when her said sister *Peggy*, about six or seven years afterwards, became engaged to marry *Allen Prior*, she, a short time before the marriage, exe-

FEBRUARY,  
1820.

~~~~~  
Prior and
others

v.

Kinney's
executors.

cuted the instrument of writing, alluded to in the Bill, which was not antedated, but actually executed on the day of it's date: that this respondent, after the said marriage, lived partly with her said sister and husband, and occasionally with her brother *Andrew Lewis*; that she permitted her brother-in-law, *Allen Prior*, to have the use of the said slaves, except two of them, *Maria* and *Charlotte*, whom she had always retained in her own immediate employment, and principally to wait upon herself; but she never at any time intended thereby to divest herself of her right of property therein; nor could she believe that the said *Prior* ever pretended to claim them as his property: that she believed the taxes on the said negroes had always been regularly paid, for her, sometimes by her brother *Andrew Lewis*, and sometimes by the said *Prior*.

The defendant *Prior* answered, to the same effect, in relation to the title to, and possession of, the slaves; stating, also, that the first execution on the said judgment had been quashed by the Court from which it issued, and all the subsequent proceedings vacated, on the ground that more than one year had intervened between the rendition of the judgment and the issuing thereof; that, at the time the said slaves were taken in execution, and for a long time since, this defendant had in his possession ample personal property, unincumbered, out of which the debt and costs of the Complainant might have been made; and that the marriage between this defendant and *Peggy Lewis* was solemnized the 25th of May 1803.

No answer was put in by the Sheriff; and no depositions were filed on either side.

By the exhibits, it appeared, that the deed of gift, from *Peggy Lewis* to *Elizabeth Lewis*, in consideration of natural love and affection, and one dollar in hand paid, was dated the 23d of May 1803, and admitted to record at November Court 1803, being proven by the oath of *Andrew Lewis*, one of the subscribing witnesses; and it being farther proven by the said *Andrew Lewis* that the subscription of *Charles Lewis*, another witness, was the proper hand writing of the said *Charles Lewis* deceased.

The Plaintiff having died, the suit was revived in behalf of his executors.

On the 17th of April 1813, Chancellor BROWN pronounced the following decree.

"In this case, the conveyance of the slaves relied upon by the defendant *Elizabeth Lewis*, and which the defendant *Allen Prior* says was executed with his knowledge and consent, is dated only two days before the marriage of the defendant *Allen*, and when there was a judgment against him for the money now claimed by the plaintiff. This latter fact appears from the defendant's own shewing, where he says the execution was quashed because it was not issued for more than twelve months after the rendition of the judgment. Now the execution, which was quashed, was issued in September 1803, and the conveyance is dated in May 1803. I can have no doubt, on the whole view of this case, that the conveyance was intended to defraud the plaintiff of this very debt, and perhaps other creditors also; and, as the defendant *Prior* admits the possession of part of the slaves, though not as his own property, I believe the sale and conveyance, *which has not been proved and recorded as the law directs*, fraudulent as to creditors, both in law and in fact:—and as, from the quashing the execution, and the other circumstances in the case, the plaintiffs would be greatly delayed, if not entirely defeated in the recovery of their debt, by the fraudulent conduct of the defendants, if this Court did not interfere; it is therefore adjudged, ordered and decreed, that the defendant *Allen Prior* pay to the plaintiffs the sum of 106*l.*, with interest thereon from the 25th day of April 1801, till paid, and \$2 83, and 15*s.* costs, together with the costs of this Court; and the conveyance of the 23d of May 1803, from *Margaret Lewis* to *Elizabeth Lewis*, for the slaves therein mentioned, is hereby declared fraudulent and void, so far as it goes to affect the rights of the plaintiffs, or delay or hinder them in the recovery of their debt; and, so far, the same is hereby annulled."

From this decree the defendants appealed."

Leigh for the appellants.

FEBRUARY,
1820.

Prior and
others

v.
Kinney's
executors.

FEBRUARY,
1820.

Nicholas for the appellees.

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Prior and  
others  
v.  
Kinney's  
executor.

The following was the opinion of the Court of Appeals.

So much of the decree in this case, as declares the Deed of May 23d, 1803, from *Margaret Lewis* to *Elizabeth Lewis*, to be fraudulent and void, so far as it goes to affect the rights of the appellees, and subject the negroes thereby conveyed, and their issue, to their claim, is hereby reversed with costs; and the residue of the said decree is affirmed.

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Decided,
March 4th,
1820.

Thompson's administrator against Thompson's executor.

1 The deputy of a Sheriff to whom administration of the estate of a deceased person has been committed, is not authorized to submit to arbitration a suit revived in the name of the Sheriff as administrator, to which the deceased, in his lifetime, was a party.

MARY THOMPSON widow of *Waddy Thompson*, filed a bill in Chancery in the County Court of Albemarle in September 1805, stating that, by a marriage contract, dated the 12th of December 1766, and recorded in May 1767, all the estate which the said *Waddy Thompson* might claim in her right under the Will of *Samuel Cobbs* her first husband, was vested in *William Lewis* as trustee for the use of herself and her heirs forever; and all the estate which she claimed or then had under the Will of her father *Robert Lewis*, was vested in the said *William Lewis*, in trust, for the use of the said *Waddy Thompson* and herself during their lives and the life of the longest liver; and, in case he should die without issue by her,

2. The provision contained in the 54th section of the Act concerning Wills &c. (R. Code of 1819, 1st Vol. p. 388,) which provides that the Emblements, severed between the 1st of March & 31st of December in any year, shall be assets in the hands of the Executors, did not apply to the case of an estate for life held under a marriage contract dated in 1766; tho' the tenant for life died in 1801, and that section, originally enacted in 1785, took effect on the 1st of January 1787.

3. The common law gives to the executors of the tenant for life, such emblements, and such only, as were seeded in his lifetime. As to such crops as are put in after his death, the executors, (in a case where the common law rule governs,) should be charged a reasonable rent for the land, to be paid to the persons entitled in reversion or remainder, according to their several rights.

MARCH,
1820.

Thompson's
administrator
v.
Thompson's
executor.

then the said estate was to return and be vested in her in the same manner as she then held it; but, if she should die leaving only one child, she was to have a right to dispose of one half; or, if two or more children, of one third part, in fee simple:—that the true meaning of the contract was, that, in the event of her being the survivor, she should enjoy the whole during life:—that *Waddy Thompson* died in March 1801; having, by his Will, but not intentionally, made a different disposition: that *Waddy Thompson*, executor of the deceased, insisted that the crops made that year were *assets* in his hands, although the plaintiff was entitled to them under the marriage contract, by virtue of which her interest, for her sole use and benefit, *vested at his death*; and especially, because, at least one half of the hands employed on the plantation of the decedent were of her own estate:—that, at the time of her said husband's death, she had issue by him five daughters:—that, after his death, and during the year in which he died, a considerable crop was made on the land which was in his occupation at the time of his death, besides a crop of tobacco, on hand, of the preceding crop, all which came to the hands of the executor, who refused to allow her any part for the maintenance of herself and two daughters living with her.

The Bill therefore prayed an account to be rendered by the said executor; and for such decree as might be agreeable to equity.

The defendant, by his answer, referred to the marriage contract, and insisted upon the crops as *assets*; remarking too, that, by the Will of the testator, ample and liberal provision was made for the complainant and the children he had by her, far exceeding the provision made by the said contract, and much more than he made for his children by his first Wife.

The County Court decreed the plaintiff to be entitled to the crops of 1801, and directed an account before a Commissioner, who reported 219*l.* 1*s.* 6*d.* in her favour; which sum was thereupon decreed to be paid.

Upon an appeal to the Superior Court of Chancery for the Richmond District. Chancellor TAYLOR reversed.

MARCH,
1830.

Thompson's
administra-
tor
v.
Thompson's
executor.

that decree, and directed the bill to be dismissed with costs:—from which last decree the plaintiff appealed to this Court; and, afterwards, upon her death, the cause was revived in the name of *Rice Garland*, Sheriff of Albemarle County, to whom administration of her estate was committed.

Stanard and Call for the appellee, moved that he be permitted to file a plea here in the following words; viz.:—“ And the appellee *Waddy Thompson* executor of “ *Waddy Thompson*, by his attorney, comes and “ says that the appeal prayed by *Mary Thompson* from “ the decree of the Superior Court of Chancery for the “ Richmond District, and which now depends in this “ Court in the name of *Rice Garland* as her adminis- “ trator, (the same appeal having, since the same was “ prayed, abated by the death of the said *Mary Thomp- “ son*, and been revived in the name of her said admin- “ istrator,) ought not to be farther prosecuted by the “ said administrator against the said appellee; be- “ cause he says that, after the decree from which the “ said appeal was prayed, and the said appeal had been “ prayed and allowed, and after the death of the said “ *Mary Thompson*, administration on her estate was duly “ committed to the said *Rice Garland* as Sheriff of Al- “ bemarle, by the order of the County Court of Albe- “ marle; and *George W. Kinsolving*, being the duly “ qualified deputy of the said *Rice Garland*, took upon “ himself, (as rightfully he might as deputy aforesaid,) “ the administration on the estate of the said *Mary “ Thompson*, with the knowledge and full assent of the “ said *Rice Garland*; and, being so qualified and acting “ as the administrator of the said *Mary*, with full au- “ thority from his said principal to act, in all things “ touching the same, with like effect as his said princi- “ pal could, afterwards, to wit, on the 6th day of April “ in the year 1813, the said *George W. Kinsolving* as ad- “ ministrator aforesaid, and the said appellee, by their “ bond, sealed with their respective seals, and now to “ the Court here shewn, did mutually and interchange- “ ably bind themselves, each to the other, in the sum of

“ one thousand dollars, to be paid when thereto required,
 “ with a condition there underwritten, reciting the facts,
 “ of the said decree of the Superior Court of Chan-
 “ cery for the Richmond District; the appeal therefrom
 “ by the said *Mary Thompson*, and her death; and stat-
 “ ing that the said *George Kinsolving* administrator of
 “ the said *Mary Thompson*, and the said appellee had by
 “ mutual consent referred the matter in controversy to
 “ the decision of *Samuel Shelton*, *Charles Fancey* and
 “ *William Woods*, and to abide by their award, to be
 “ binding on them as if determined in the regular course
 “ of law; and, in that event, if the party against whom
 “ the award should be made, should abide thereby, then
 “ the said obligation to be void, else to remain in full
 “ force: and the said appellee avers, that the said referees
 “ did take upon themselves the burthen of the said arbi-
 “ trament, and did, thereafter, to wit, on the 6th of
 “ April 1813, at the County of Albemarle, in the pre-
 “ sence of the parties to the said submission, in pursu-
 “ ance of the said submission, arbitrate and determine of
 “ and concerning the matter in controversy in the said
 “ appeal, and did then and there award and determine
 “ that the said *Mary Thompson* was not entitled to any
 “ part of the crop made, in the year 1801, on the land
 “ held by her deceased husband *Waddy Thompson* the
 “ testator of the appellee; the said year 1801 being the
 “ year of the death of her deceased husband, and the crop
 “ made that year, claimed by the said *Mary*, being the
 “ matter in controversy in the said appeal; and they did
 “ farther award, that the said *George W. Kinsolving*
 “ should pay the appellee the costs by him expended in
 “ the said suit, in which the said appeal was prayed, up-
 “ to the time of the said award; which award, subscrib-
 “ ed by the said arbitrators, is also to the Court here
 “ shewn, and of which the said *George W. Kinsolving*
 “ then and there had notice; by reason of all which pre-
 “ mises, the said appellee says all manner of error and
 “ errors, defects and imperfections, done or suffered, in
 “ or by the said decree, were removed, destroyed and
 “ released, and the said representative of the said *Mary*

March,
1820.

Thompson's
administra-
tor
v.
Thompson's
executor.

MARCH,
1820.

Thompson's
administra-
tor
v.
Thompson's
executor.

"Thompson disabled from urging the same on the said
"appeal; all which the said *Waddy Thompson* is ready
"to verify."

Upon the motion to receive this plea, the following was
the Court's opinion.

The Court, not deciding whether a plea, such as that
offered in this case, would have been proper in this Court,
had the alledged submission been agreed to by *Rice Gar-*
land the Sheriff, who is the party to the suit now depend-
ing, is of opinion that the *Deputy Sheriff* had no right to
make the submission; and therefore the plea offered is re-
jected by the Court. The case is therefore to come on,
upon it's merits.

After argument, by *Wickham* for the appellant, and
Stanard, Call and *John Robertson* (Attorney General.)
for the appellee, Judge *ROANE* pronounced the opinion of
the Court as follows:—

The Court is of opinion, that the provision contained
in the 54th section of the Act concerning Wills, &c., (R.
Code of 1819, 1st vol. p. 388,) and which provides that
the Emblements, severed between the 1st of March and
31st of December in any year, shall be assets in the
hands of the executors, does not apply to this case, if it
applies to the case of lands held for life only; it being a
new provision materially affecting the rights of the par-
ties, and introduced into our Code subsequently to the
execution of the marriage contract in the proceedings
contained:—but the opinion of the Court is, that the
principle of the common law in relation to Emble-
ments, and which is in some respects more favourable to
the representatives of the tenant for life than the provi-
sion of that section, is to govern in this case; it being
wholly unimportant whether the husband holds in right
of his wife by virtue of a marriage contract, or by the
general principles of law. That principle gives to the
executors such emblements, and such only, as were *seeded*
in the life time of the tenant for life:—but, in relation to
such crops as were *afterwards put in*, the Court is of
opinion that, in the case which has happened, the execu-
tors should be charged a reasonable rent for the land, to

be paid to the wife and the children, according to their several rights accruing on the death of the husband, and for which purpose the said children ought also to have been made parties.

March,
1820.

Thompson's
administra-
tor
v.
Thompson's
executor.

The Court is farther of opinion that, as the provision contained in the 53d section of the said Act, was in force at the date of the contract aforesaid, (1) it concludes the said wife and children from demanding any hires for the slaves remaining on the land at the time of the death of the testator, but that the same were to continue thereon until the end of the year.

Both decrees are to be therefore reversed with Costs, and the cause remanded to have the requisite parties made, and the cause finally proceeded in, pursuant to the principles of this decree.

(1) Note. See 4 *Hen. St. at large*, p. 21, 284; edit. 1733, acts of 1711. c. 2, § 17; edit. 1752, c. 8; and 1769, c. 8; acts of 1748. § 30, 25:

Decided,
March 8th,
1870.

Mayo against Tomkies.

1. In a suit in Chancery, to foreclose a mortgage, against purchasers claiming under a devise of the mortgagor, not only the persons from whom they immediately derive their title, but also the said devisee, or his heirs, and all other devisees of the equity of redemption, ought to be made parties; notwithstanding such equity was devised to some of them upon conditions; for whether such conditions were complied with, can not be legally investigated, until they are

THIS was a suit (transferred from the late High Court of Chancery to the Superior Court for the Williamsburg District,) originally instituted in the year 1793, by *Charles Tomkies* and *Anne* his wife, (late *Anne Dixon* daughter of *Thomas Dixon* deceased,) and *John Blair* her surviving trustee, for the purpose of foreclosing a Mortgage upon a tract of land, containing by estimation 3300 acres, being in the Counties of Hanover and Louisa, and also sundry slaves; which Mortgage was executed on the 3d of November 1767, by the Rev. *John Dixon* of the County of Gloucester and *Roger Dixon* of the town of Fredericksburg, to secure the payment of sixty pounds sterling *per annum*, "to the said *Thomas Dixon*, his heirs, executors, administrators, or assigns, during his life and the life of his daughter *Anne*, or during the life of the longest liver of them." The said Mortgage was duly recorded in the General Court.

2. It is not sufficient to make a person a party as *Executor*, and to call upon him to answer as *such*, if he be interested in the controversy as a *devisee*, or should be called upon to answer as to his *individual* interest or transactions.

3. Where lands devised to be sold, have been sold by *one* of several executors, all the executors ought to be parties to a suit to foreclose a mortgage previously existing upon those lands. So, also, all the purchasers; in order to be subjected to a *rateable* contribution to satisfy the mortgage.

4. A decree against purchasers of a tract of land incumbered by a mortgage to secure the payment of an *annuity*, ought to provide, that so much of their lands, respectively, be sold, as will be sufficient to pay their proportions of the sum remaining due, and unsatisfied by a sale of so much of the tract as was retained by the vendor, and liable to be sold; except so far as they shall pay their respective proportions of such debt, and agree to hold their lands subject to the future decree of the Court for their proportions of any sums growing due to the plaintiff thereafter.

5. A mortgagee of lands and slaves, can not be compelled to resort to a sale of the slaves before he shall disturb the possession of *bona fide* purchasers of the lands from the mortgagor: but the decree against such purchasers ought to permit them, after satisfying the claim of the mortgagee, to seek indemnity out of the mortgaged slaves, or the estate of the mortgagor, or any other person liable to such demand, so far as the mortgagee might be able to charge such party, or otherwise.

By a subsequent Deed, dated October 17th, 1774, *Thomas Dixon* conveyed the said annuity to the Rev. *John Dixon* and *John Blair* of Williamsburg, in trust, for the benefit of himself during his life, and of his daughter *Anne* after his death, for her separate use, so as not to be subject to the control of any husband she might have. This deed was recorded in Gloucester County Court, Dec. 1st, 1774.

March,
1820.
Mayo
Tomkies

The Rev. *John Dixon* made his Will on the 28th of January 1773, containing, among other devises, the following: "I give unto my son *Thomas Dixon* my land on "Beaver Creek in the County of Louisa; also half the "tract of land which contains about three thousand "acres on Taylor's creek in the said County, which "I sold for the payment of my father's debts, and, "jointly with my brother *Roger Dixon*, purchased for "the sum of four hundred and twenty-five pounds: as "now the title to the whole is in me, and of one half "after the purchase, that half I bequeath to my son "*Thomas, after a mortgage, upon it and the slaves there-* "on, to Captain *Thomas Dixon*, is satisfied; to have and "to hold to him and his heirs forever. Item, I give to "my nephew *Roger Dixon* the other half of the before "mentioned tract on Taylor's Creek, after the mortgage "is cleared off: provided the estate of my brother *Roger* "Dixon shall pay one half of the debts to the creditors "of my said father; otherwise, his family has not any "just claim to any part of the land on Taylor's Creek "aforesaid; and, in the case of any deficiency of the pay- "ment of one full half of the debts of our late father "*John Dixon* by the estate of *Roger Dixon*, I then give "the whole tract on Taylor's Creek, when clear of "mortgage, to my son *Thomas Dixon*, to have and to "hold to him and his heirs forever, instead of my ne- "phew *Roger Dixon*, and his heirs forever."

It was stated in the Bill, that *Roger Dixon* the nephew never accepted the devise of one half of the mortgaged land, nor performed the condition on which it was to vest; and that, some years since, he left this Country and went to parts unknown, since when he had never been

MARCH,
1820.

Mayo
v.
Tomkies.

heard of by any of his friends or connections in this Country, as far as the plaintiffs knew or believed; so that there was great reason to presume he was dead: that *Thomas Dixon* the younger (the other devisee) entered into some contract with *John Dixon* the younger, concerning a sale to him of the whole of the said mortgaged land, the precise terms of which were unknown to the plaintiffs, who were informed, however, that no legal conveyance was made, but that the said *John Dixon* (with consent of *Thomas*) took possession of said land, and exercised the right of ownership over it, and, moreover, admitted himself chargeable with the annuity aforesaid.

The only defendants to this Bill were *Thomas Dixon* the younger, surviving executor of the said *John Dixon* the younger, who was executor of *John Dixon* the elder, and also *John Dixon*, *Lucy Dixon*, *Elizabeth Dixon* and *Signora Dixon*, children of the said *John Dixon* the younger, against whose real estate the plaintiffs requested farther relief, in case the mortgaged premises should prove insufficient to satisfy their whole demand.

The answer of the defendant *Thomas Dixon* admitted that *Roger Dixon* the devisee never entered on the premises devised to him, but alledged that he had been heard of *within two years, and was not known to be dead*. The respondent also admitted a contract to have been made, whereby he sold the land to *John Tabb*, who sold it to *John Dixon* the younger. He contended that the annuity was nearly, if not fully, paid up, to the death of the said *John Dixon* his testator; but, if not, *he had no assets to discharge what might remain due*.

Chancellor WYTHE, in May 1799, directed a Commissioner to state and report an account of money due for the annuity claimed by the Bill; in obedience to which order, a Report was made. In April 1803, the suit abated as to the plaintiffs *John Blair* and *Charles Tomkies*, and the defendant *Thomas Dixon*, by their deaths; and, on the motion of *Anne Tomkies* the surviving plaintiff, who filed a Bill of revivor, a subpoena was awarded against *Mildred Dixon* widow, devisee and executrix, of the said *Thomas Dixon*, and his children, co-heirs and devisees.

MARCS,
1820.Mayo
v.
Tomkies.

The said *Anne Tomkies* afterwards filed a supplemental Bill, and also another amendatory thereto, making *John Mayo* of the City of Richmond, and sundry other persons, charged as purchasers of the mortgaged lands, from the said *Thomas Dixon* the younger and his brother *John Dixon*, additional defendants; representing that the whole lands were not more than sufficient to pay the arrears of the annuity, *with interest*, on each sum annually due, from the time when it should have been paid, which the plaintiff demanded as just and reasonable; and praying that the persons named should set forth on oath and say, how many acres of land, part of the said tract, each and every one of them was possessed of; *when* he became so possessed, and *in what way?*; what was the value per acre of the land possessed by each, comparing it with the whole tract?; what was the value of the whole tract per acre, and of the annual profits of the whole, and of each separate tract as separately possessed?; that a decree be made for sale of said lands, and payment of her whole claim *with interest*, according to the rules and principles of Equity, against one, or more, or all of the defendants, as might be thought proper.

Answers were put in by *John Mayo* and the other purchasers; from which it appeared that *John Mayo* the elder, father of the said *John Mayo*, bought the lands in question, in the year 1779 or 1780, of *John Dixon* the eldest son of the Rev. *John Dixon*; the legal title to which, being in *Thomas Dixon* brother of the said *John*, was by him conveyed by a Deed with warranty to the said *John Mayo* the elder, who departed this life in January 1786, having by his Will authorized his executors, who were *William Mayo*, *John Berkeley*, *William Smith* and *John Mayo*, to sell the said lands; that, under the authority so given, several parcels thereof were sold to the other purchasers, all of whom, (so far as made defendants,) as well as the defendant *Mayo*, insisted that the purchases by themselves, and by those under whom they claimed, were made *bona fide*, without any knowledge or suspicion of any out-standing incumbrance upon the land. They

MARCH,
1820.

Mayo
v.
Tomkies.

also relied on the length of time before the suit was brought, and other circumstances, to induce a presumption that the claim was satisfied; and contended, (if it was not,) that the representatives of *John Dixon* the younger and *Thomas Dixon* should be brought before the Court, and, to prevent circuity of action, compelled to bear the burthen, which ultimately must fall on them; and that, at least, the *slaves*, said to be mortgaged, as well as all the personal effects of *John Dixon*, should be first applied to extinguish any balance remaining due.

Mildred Dixon widow and devisee of *Thomas Dixon* filed an answer referring to his answer formerly filed, as containing a true statement of facts, in relation to any interest she might be presumed to have. She farther said she was informed that *Roger Dixon* was still alive, residing in the district of Natchez.

John Dixon, only son and one of the heirs of *John Dixon* the younger, by his answer, rendered an account of the real estate devised to him, showing that he had paid, and stood responsible for debts of his father to a greater amount than the value of the said estate; and that neither his sisters nor mother received or succeeded to any property under his father's Will.

The cause was heard at Williamsburg in April 1812. as to the defendants *John Mayo* and others purchasers of the land incumbered by the mortgage, and as to the defendant *Mildred Dixon*; whereupon, rejecting the Commissioners' report as to the interest charged therein, the Court decreed, that, unless the defendants should, on or before the first day of November then next ensuing, pay to the plaintiff the sum of 2136*l.*, current money of Virginia, being the arrears of the annuity due from the first day of January 1782, with interest at the rate of five per centum per annum from the 23d day of April 1812, (the date of the decree,) 'till paid, and all costs and charges attending the prosecution of this suit, the defendants, their heirs, and all others claiming under them, should be from thenceforth barred and foreclosed &c., and that certain Commissioners (named in the decree) or any

March
1690.

Mayo
v.
Tankier.

those of them, should, in that event, after giving six weeks previous notice in one of the Richmond Newspapers, expose to public sale, by auction, for ready money, that part of the land, in the mortgage mentioned, which remained in the possession of the defendant *John Mayo*, or so much thereof as would satisfy and pay the said sum of £2186*l.*, with interest and costs, as aforesaid, and, out of the proceeds of the sale, pay unto the plaintiff her said debt, interest and costs; and the surplus, if any, after deducting the expenses attendant thereon, pay to the defendant *John Mayo*: and, in case that part of the land in the possession of *John Mayo* should not be sufficient &c., that they, in like manner, should, after giving notice &c., sell that part of the said tract of land of which the other defendants were possessed, &c.; unless the said defendants, or any of them, should, on or before the day of sale, pay unto the said Commissioners, their respective proportions of the balance of the plaintiff's debt, interest and costs, remaining unsatisfied by the sale of *Mayo's* part; having ascertained by satisfactory evidence the values of their several tenements, and the proportions which such values would bear to such balance; and make report, &c.

The Commissioners reported, a sale of Mayo's land, in obedience to the decree; the proceeds amounting to 94*l.* 10*s.* 0*d.*; a statement of the debt, interest and Costs, including a Commission of five per centum to themselves upon the amount; shewing the total to be 2406*l.* 11*s.* 3*d.*, and the balance, to be provided for by a farther sale, 1457*l.* 1*s.* 9*d.*;—an apportionment made by them of that balance among the other purchasers, shewing the sums for which they severally were responsible;—and, finally, an account of sales of those lands; on the face of which it appeared, that the land of *William Henderson* one of the defendants, was bought, by the Commissioners themselves, for the sum of 209*l.* 14*s.* 11*d.*

Exceptions were taken to this Report; 1st, because the said Commissioners were directed by the decree to sell that part of the land in the possession of *John Mayo*, in

MAYO,
1820.

Mayo
v.
Tomkies.

the first instance; when, in fact, none was in his possession, for what remained unsold was in the possession of the executors of his father, of whom he was one; and, although it was the obvious duty of the Commissioners to state in their advertisement the quantity of the land, for the purpose of inducing minded men to attend as bidders, they failed to do so:—3d, because the said Commissioners proceeded to sell, when apprised that the defendant Mayo intended to appeal from the decree; which he was prevented from doing, in the first instance, by not knowing there was a decree, until after the period, allowed him for giving the appeal bond, had elapsed: 3d, because, in selling the residue of the said lands, they omitted several parcels which should have been contributory according to the decree; and, also, because they made the allotment, and gave no notice thereof 'till the day of sale: 4th, because they became themselves purchasers at the sale under the decree, which purchase was illegal and void: and, 5th, because they charged a larger sum for their own commissions, than was a reasonable compensation for their trouble.

The Chancellor overruled the 1st, 2d, 3d, and 5th Exceptions, but, sustaining the 4th, decreed that the sale of *William Henderson's* land be set aside, and that, unless, on or before a day appointed by the decree, the said *Henderson* should pay to the said Commissioners the sum of 209*l.* 14*s.* 11*d.*, they should again sell the said land as before, and pay the said sum to the plaintiff; and that the said Commissioners should make a deed without warranty, to the said *Henderson*, if he should pay the said sum, or to the purchaser if a sale should be made. The rest of the report was confirmed, and the Commissioners were ordered to pay to the plaintiff 208*l.* 4*s.* 6*d.*; (being the sum due after deducting *Henderson's* proportion:) to execute deeds without warranty to the purchasers; and, after paying all expences of carrying the decree of April 25th, 1812, into effect, to pay to the defendants the surplus, if any, in proportion to their respective over advances; and make report, &c.

From this decree the defendant *John Mayo* appealed.

The following was the opinion of this Court.

The Court is of opinion that *Roger Dixon*, to whom a moiety of the Equity of redemption of the mortgaged land in the bill mentioned was devised by *John Dixon* on certain conditions, ought to have been made a party to this suit; because, if those conditions were complied with by the representatives of his father *Roger Dixon*, or by himself, (and whether they were or not, can not be investigated until he is made a party,) he would be devisee of the equity of redemption of the said moiety, and entitled to redeem the same, by payment of a moiety of the appellee's claim; and as, in redeeming, he would not be permitted to disturb the purchasers under *Mayo*, in their possession, except so far as the unsold lands should be insufficient to make good his moiety, these questions ought first to have been settled, preparatory to a final decree.

The Court is farther of opinion, that, as *Thomas Dixon* son of the Revd. *John Dixon* was an unconditional devisee of the equity of redemption in one moiety of the mortgaged lands, and conditionally so of the other, that moiety certainly, and possibly the other, has descended to his children and heirs at law; and, although the said *Thomas Dixon* was made a party to the suit, as the *Executor of his brother John Dixon*, and answered as such, and in that answer admits a sale to have been made by him of the premises to *John Tubb*, who sold to his brother *John Dixon*, yet he is not made a party, nor called on to answer, as to his individual interest or transactions; nor does it appear that any adequate conveyance was made by him of his said equity, although it is stated, in the answer of *John Mayo*, that a Deed was made to his father *John Mayo* the elder by him, the terms of which, however, are not stated. His heirs therefore ought to have been before the Court, as well to contest the claim of *Roger Dixon*, as that of *Mayo*, and those claiming under him, so that the rights of all parties might have been settled in the final decree.

MARCH,
1820.

Mayo
v.
Tomkins.

Mand.,
1820.

Mayo
v.
Tomblin.

The Court is farther of opinion, that, although the Will of *John Mayo* the elder is not in the record, yet it being averred, in the answer of the appellant *John Mayo*, that he was only one of four Executors of the said Will, and, although he admits that he himself made the sales, yet the other Executors may be interested even as to those lands, and most probably were so in the lands remaining unsold, and therefore ought to have been parties, in order to a final and full adjustment of the title:—so too, if there were other purchasers under *Mayo*, in possession of any part of the land in question, and who were not brought before the Court in order to be subjected to a rateable contribution, (as is stated in the exceptions to have been the case,) they ought to have been made parties.

The Court is of opinion farther, that, as to the purchasers under *Mayo*, the Decree ought to have provided that so much of their lands respectively should be sold as would be sufficient to pay their proportions of the annuity due to the appellee, and unpaid by the Executors of *Mayo*, or unsatisfied by the sales of lands remaining in them, and liable to be sold; except so far as those purchasers shall agree to pay and actually pay their respective proportions of such balance, and to hold their lands subject to the future decree of the Court for their proportion of any sums growing due to the appellee thereafter.

The Court is farther of opinion, that, if the whole annuity due and growing due to the appellee, shall thus be paid and secured to be paid, then the Executors of *Mayo*, and the purchasers under them, ought to be permitted to proceed in any way they may be advised to be proper, to seek indemnity out of the mortgaged slaves, or from the estates of the original mortgagors, or of any other person or persons, who, they may be advised, are liable to such demand, either so far as the appellee might be able to charge such party, or otherwise.

The Decrees are therefore reversed with costs, and the cause remanded, to have the proper parties made, and to be proceeded in to a final decree according to the foregoing principles.

Shepherd against Larue and Neply against Kinchalcø.

Decided,
March 15th,
1820.

IN these two cases, (which were argued together,) bills of review were filed by the appellants against the appellees, in the Superior Court of Chancery for the Staunton District, praying the reversal of decrees of that Court, dated in April 1807 and July 1809, for errors in law appearing (as the appellants insisted) on the record. The Bill of Review, in each case, was filed without obtaining the leave of the Court, and demurred to for that Cause.

Chancellor BROWN dismissed the Bills, with costs.

In argument, by *Leigh* for the appellants, and *Stanard* and *Wickham* for the appellees, several points were made and discussed, on both sides, which need not here be mentioned; the only questions determined by this Court being, 1st, whether the bills of review were offered in due time; and 2dly, whether the length of time between the date of each decree and exhibition of the bill to review it, could be relied upon, *not having been pleaded*.

Leigh contended that the objection founded on the lapse of time, was not admissible, without a plea. To prove this, he cited *Prince v Heylin*, 1 *Alk.* 494, as a case in which the doctrine is plainly laid down in the Chancellor's opinion, tho' the decision of the point was not necessary in that case. Upon the reason of the thing, the Act of Limitations, whenever relied upon as a defence, ought to be pleaded.

Stanard contra. The Bills of Review were barred by length of time. (a) Mr. *Leigh* has confounded the rule applying to pleading the Act of Limitations as a bar to original remedies, with the rule founded on the presumption of abandonment of right from lapse of time. Twenty years are a bar to a bill to redeem, exhibited by a mort-

not true, it may be denied by the answer of the other party; and, (if in his favour,) the bill of review should be rejected.

1. A Bill of review to a decree pronounced before the 11th of Feb. 1814. (see Acts of 1813, c. 12. § 3,) could not be received after five years had elapsed from the date of such decree.

2. It is not necessary to plead the Act of Limitations against a Bill of Review; for it ought to appear, in the Bill itself, that it is exhibited within the time prescribed by law; or that the complainant is protected by some of the savings in the act; otherwise it ought not to be received.

3. In such case, if the fact alleged to prevent the operation of the Act, be proved,

MARCH,
1820.

Shepherd
v.
Larue, and
Neply
v.
Kinchalo.

gagor out of possession; but this bar is never *pleaded*. There is no case of such a plea. So, also, as to bills of review, there is no example in the books of practice of a plea of lapse of time in bar to the receiving of such bill. We were obliged, by the forms of proceeding, to plead, as we did, the *decree* in bar; and this gave us every advantage we could obtain by pleading the act of Limitations.

Wickham on the same side. The limitation of time is a conclusive bar to the bills of review, which in these cases were filed more than five years after the decrees were pronounced. As to the Writs of Error, the point of time affects the jurisdiction of the appellate Court, as much as does the *sum* in controversy. (b) The *plaintiff* who wishes to get the Writ of Error, or Bill of Review, is bound to *show* that the Court has jurisdiction. Where the act of Limitations appears, *on the face of the record*, to be a bar, there is no necessity to plead it. There is no authority deciding a plea to be requisite in such case. Was it ever heard of that the act was *pleaded* to a Writ of Error.

(b) See
R. Code of
1819, 1st
Vol. p. 492.

Leigh in reply.—The doctrine is laid down in 2 *Bac. Abr.* (*Grw's. Edit.*) p. 499, that the Act of Limitations must be pleaded to a Writ of Error. The reason assigned is, that the other party may, by replication, bring his case within some of the exceptions stated in the Act.

The limitation on Bills of Review, in England, is only by analogy to that on Writs of Error. The same rule must therefore prevail in both cases as to the necessity of pleading the act.

Stanard. In *Smith v. Clay*, *Ambl.* 645, there was no pleading in the cause; yet the Court rejected the Bill of Review, on the ground of length of time. The rule is, that the *plaintiff in review must show himself entitled to file the Bill.* (c)

(c) 4 *Bro.*
ch. cases,
441; 1 *Bro.*
Parl. cases
93; 5 *idem*
460, 6 *idem*
395.

Judge ROANE delivered the following opinion of this Court.

The limitation of bills of review in England was not fixed by any Statute; but was established by analogy to that of Writs of error, which was twenty years. When

the limitation of Writs of Error and *Supersedeas* was reduced by *our* Act, to five years, (which was prior to the decree in question,) a correspondent variation was made as to the time, on the principle aforesaid, by which the limitation in bills of review was reduced to five years, and the savings in the said Act were also adopted. Thus the matter stood, at the date of the original decree, and until the year 1813, when the legislature reduced the time to three years by a positive provision. This provision only applies, however, to decrees posterior thereto, on the principle on which this Court went in the case of *Day v. Picket*, 4 *Munf.* 104; and the term of five years therefore applies to the case before us.

MARCH,
1820.
Shepherd
v.
Larue, and
Neply
v.
Kinchalc.

Five years being the limitation of bills of review in this case, it ought either to appear *from the bill*, that that term had not expired, or that the plaintiffs were protected by some of the savings of the Statute: and if, in such case, this fact should be untruly stated, the answer of the other party might deny it; and, on the proofs, (if in his favour,) the bill of review would be rejected. In the cases before us, however, it does not appear *when* the bills of review were filed:—the time in this particular is left blank. It is necessary that this defect be amended by *certiorari* or otherwise. If, on such amendment, it appears, that the term had expired, then the decree is right, but perhaps for a different reason:—if, on the contrary, it shall appear that the term had not expired, it would be then for us to consider the cases on their merits.

It is submitted to the bar, what course to take for supplying this defect.

(P) Judge BROWN (the Chancellor who pronounced the decree) happening to be present, informed the Court, (being requested by the Counsel on both sides,) that the bills of review were in fact exhibited after the five years had elapsed. The Court therefore, accepting this information as supplying the defect in the record, affirmed the Decrees.

Decided,
March 18th,
1820.

Wells against Washington's administrator.

1. In debt **THIS** was an action of debt in the County Court of Fairfax, instituted by *Cornelius Wells* assignee of *Joseph Reid*, against the administrator with the will annexed of *Edward Washington* deceased, on the 12th of March 1816, upon a promissory note of the said *Washington* dated August 14th, 1795.

At the trial, on the plea of *payment by the testator*, the defendant moved the Court to instruct the Jury that, "twenty years having intervened between the time when the note became due and the instituting of the suit, they ought to presume the note paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest, or part payment of principal, within the twenty years. Nor can the Court be justified in refusing to give such instruction on the ground that the defendant, in his application, has not stated the evidence given in the cause; or that, in the Court's opinion, the said principle of law does not apply to the case, under the circumstances appearing in proof; for this would be undertaking to judge of the weight of evidence, of which the Jury are the proper judges."

the Court, if requested, ought to instruct the jury, that, twenty years having elapsed between the time when the note became due and the instituting of the suit, they ought to presume it paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest, or part payment of principal, within the twenty years. Nor can the Court be justified in refusing to give such instruction on the ground that the defendant, in his application, has not stated the evidence given in the cause; or that, in the Court's opinion, the said principle of law does not apply to the case, under the circumstances appearing in proof; for this would be undertaking to judge of the weight of evidence, of which the Jury are the proper judges."

ever received his share of that crop; that another witness swore that he knew the said *Washington* not to be punctual in paying his debts, but otherwise in collecting what was due him; that a third knew him intimately, and considered him a careless man, not attentive to his affairs; that he knew him to pay money without any receipt for it; and that *Reid* lived many years with *Washington*, who had a good opinion of him.

A Verdict was found, and judgment rendered for the plaintiff. The defendant obtained a *Supersedeas* from the Superior Court of law,(1) which reversed the judgment, on the ground that the County Court erred in refusing to give the instruction requested; and that judgment, upon an appeal to this Court, was affirmed.

(1) Note. In the petition for the *Supersedeas*, it was remarked, that the County Court, in it's opinion and instructions to the Jury, proceeded either on the principle that the presumption of payment, arising from lapse of time, was not admissible in relation to an instrument not under seal, or that, if admissible, such presumption was repelled by the evidence offered to the Jury on the part of the plaintiff. The petitioner was advised that presumption of payment arising from lapse of time, had been adopted as a rule of evidence generally, and, on principle, applied equally to cases of unsealed as of sealed instruments; or, if any thing, more strongly to the former; and, if such presumption is to be repelled by evidence, the Jury are the only judges of the weight of such evidence:—that, if the Court did not proceed on the principle first stated, then they had taken upon themselves the province of deciding on the weight of the testimony offered, and had not submitted it to the Jury; and thus, on either ground, the opinion and instructions, under which the Verdict was rendered, were erroneous.

M RCH,
1820.



Wells

v.

Washington's admin-
istrator.

Decided,
March 18th,
1820.

Christian's devisee against Christians and others.

1. The general principle laid down in the case of *Nelson and v. Cromwell, 4 Munf. 155*, does not apply to a case in which the rights of the parties can not be adjusted in the Court of Chancery, but the aid of a Court of Equity is necessary to give to each his proper share of the land, for which one has improperly obtained a Patent.

UPON an appeal from a decree of the late High Court of Chancery, in a suit in which *John Christian* of the County of Buckingham was originally complainant, and *George Christian's* children, together with *William Price* Register of the Land Office, *John Booth*, *Thomas Staples*, *Drury Bell*, and *Samuel Bell* were defendants.

The plaintiff's case, according to the allegations in his original, amended and supplemental bills, was, in substance, as follows:—

In the years 1747 and 1753, *James Christian* the elder, (father of the plaintiff and of *Charles. James* and *George Christians*.) made entries for several parcels of land then vacant; viz., one for 390 acres, another for 365 acres, and a third for upwards of 2000 acres, all which entries were duly surveyed in his life-time. On the 19th of January 1753, so much of those lands as lay on *Flavanna River*, on both sides thereof, including the *Buffalo Islands*, were comprehended by the Surveyor of the County of Albemarle in one survey, which (the vacancies between the former entries being included,) amounted to 2350 acres. Of these 2350 acres, he obtained in his life-time patents for two tracts only, to wit for 200 acres called *Buffalo Island*, and for 240 acres called *Coleman's neck*; which he was said to have aliened, leaving 1910 acres unpatented.

2. A testator having two brothers, devised to one of them a tract of land, describing it as his plantation on *H. creek*; and to the other,

"the plantation whereon he lived, and his lands thereto belonging." This devise was construed as giving the last mentioned brother, not only the plantation or cleared land where the testator lived, with the adjoining woodland, used for timber and fuel, but the whole tract and several other tracts adjoining thereto.

3. In decreeing a partition in favour of a plaintiff claiming by equitable title, the Court ought not to direct that the holders of the legal title stand seised of the plaintiff's part to his use; but, that they convey the same, by deed, to him and his heirs.

4. In a suit in Chancery to recover a tract of land claimed by equitable title, and for other objects; if it appear that some of the defendants are entitled to a moiety of the land, by an equitable title adverse to that of the other defendants, the Court should permit them to unite as plaintiffs in the suit, to claim such moiety.

On the 18th of May 1752, he made his last Will, which was admitted to probate March 8th 1759, whereby he directed the said large survey (under the description of the remainder of his land) to be equally divided among his four sons; and, in 1768, he died. No farther step was taken concerning the said lands, until at least the year 1761, when *Charles Christian* the eldest son died, without wife, child or will. *James Christian* the second son, inherited *Charles Christian's* proportion of the said inclusive survey, and made a settlement thereon. About the year 1768, 1769, or 1770, the plaintiff, who was the third son, and *George Christian* the fourth, agreed to take possession of a part of the said land, and work the same in partnership, and accordingly did take possession of about 800 acres, or probably more, with the approbation of their brother *James Christian*, on one side of a branch of water which divided their plantation from his, and lived together thereon, in partnership as aforesaid, for several years; but, before the death of *James Christian* the younger, which happened in 1781, they divided their proportion aforesaid between themselves, according to stated metes and bounds; leaving however, the quantity of each uncertain, but separated by an agreed fence.

James Christian the younger, on the 20th of October 1772, made his last Will, by which he gave to the plaintiff a part of the land reserved to himself, which part he described as his plantation on *Hooker's* creek, joining *Henry Bell's* line and *William Duval's* line, containing 300 acres; and to *George Christian* another part, by the description of the plantation whereon he lived, (which contained about the same quantity,) and his lands thereunto belonging. The said *George Christian* died intestate, about the year 1784 or 1785, leaving a widow and four children.—The Survey aforesaid of 2350 acres, was returned to the Register's Office by *James Christian* the younger, on the 29th of May 1780, for the purpose of procuring a Grant; but, in as much as he paid the ancient composition money for 1910 acres only, to which the said Survey was reduced as aforesaid, the Register retained the Survey, in

MARCH,
1820.

Christian's
devisee
v.
Christians
and others.

MARCH,
1820.

Christian's
devisee

v.
Christians
and others.

order that a proper certificate might be obtained of the said reduction. Things rested thus, until about the year 1794, when a Treasury Warrant was located on a computed quantity of 1036 acres, (*part of the said survey,*) in behalf of *George Christian's* children, comprehending that part of the survey which had been assigned to the complainant by the said *George* himself; and a patent was obtained by them by virtue of the said location; *the plaintiff having entered in the Land Office a Caveat against it, but, unfortunately, failed to file a Copy thereof in the proper Court in due time:* and, tho' the plaintiff, by virtue of one of the surveys, made as aforesaid by *James Christian* the elder in 1747, obtained a patent, as heir at law to his said father and brothers *Charles* and *James*, for 365 acres, comprehended within the lines of the said 1036 acres, and, offering to fulfil every requisite of the law, called upon the Register in vain to issue a Patent for the 1910 acres, (part of the Survey of 2350 acres, which survey had never lost it's validity;) yet the children of *George Christian* brought an Ejectment, and obtained a Judgment against him, for so much of the said 1036 acres as was held by him. The plaintiff therefore prayed an Injunction to that Judgment; that his rights in the said large Survey, as well under his father's Will as that of his brother *James*, be protected; that the *dividing line* between him and the said *James* be established; that the Register be directed to issue to him Grants for those rights, as far as they were incomplete in law; that the Grant to *George Christian's* children be set aside, so far as it interfered with those rights; and for general relief.

The Bills farther stated, that a part of the plaintiff's interest in the large Survey aforesaid was covered by Warrants located thereon by *Henry Bell* and *Drury Bell*; that, on the 21st of November 1795, *Drury Bell* obtained a Grant, for 138 acres; and *Henry Bell* (of whom *Samuel Bell* and *Drury Bell* were afterwards the devisees,) a Grant for 414 acres; that the plaintiff was not in possession of the said 414 acres, but, with *James Christian*, had been in possession of the said 138 acres at least

twenty-five years: that *John Booth* and *Thomas Staples* obtained a Grant, bearing date the 25th of March 1796, for 1500 acres, including 400 acres of the said Survey of 2350 acres: that the plaintiff's Caveats, against the issuing of those grants, were dismissed, because they were not entered in the County Court in time: that *John Booth* instituted an Ejectment in Buckingham County Court, for the said 400 acres, altho' the plaintiff had been in possession thereof at least twenty-five years. He therefore prayed that *John Booth*, *Thomas Staples*, *Drury Bell* and *Samuel Bell* be decreed to convey to him all their respective rights under the said Grants.

March,
1820.

Christian's
devisee
v.
Christians
and others.

From the Answers of the several defendants, Exhibits and Depositions, and a connected plat of the lands in controversy, it appeared that the plaintiff and *George Christian*, on the 13th of December 1771, received a transfer from *James Christian the younger*, of a Survey of 400 acres of land, lying on the South side of the Fluvanna River, dated the 26th of February 1747, being the same 400 acres which *Booth* and *Staples* included in their patent for 1500 acres, dated March 25th 1796; that *Henry Bell*, father of the defendants *Drury* and *Samuel*, purchased of *James Christian the elder* 400 acres, surveyed for him Dec. 4th 1747; paid the purchase money, took a title bond, and had peaceable possession of the land in the life-time of the vendor; that *James Christian the younger* promised to make him a conveyance of the said 400 acres, but failed to do so; which 400 acres were afterwards included in his Grant for 414 acres aforesaid, dated Nov. 21st 1795: that the 138 acres, for which *Drury Bell's* grant was obtained, were comprehended in the said Survey of 2350 acres; that the Survey of 390 acres, dated Nov. 16th, 1747, and another of 123 acres made for *James Christian the elder*, March 24th, 1747, were included in the lands devised by *James the younger* to *George Christian* and the complainant; that a fence was agreed upon as separating the lands of the said *George Christian* and the complainant, but no line was marked between them: the course of the dividing fence was shewn by a red dotted line, in a connected plat made out and signed by the par-

MARCH,
1820.

Christian's
devisee
v.
Christians
and others.

ties: that, on the 4th of June 1798, a grant was issued to the complainant *as heir at law to James Christian deceased*, for 400 acres lying in Albemarle County on both sides of Stone Wall Creek, on a Survey made the 17th of Nov. 1747, which was not included in the 2350 acres: that the patent for 1036 acres, obtained by the children of *George Christian*, comprehended the *whole* of the aforesaid surveys of 123 and 390 acres, on one of which the house of the complainant stood: and that, on the 30th of December 1801, *Joyce Christian*, devisee of the complainant who then had departed this life, obtained a patent for the said 390 acres.

The suit, having abated by the complainant's death, was revived, upon a Bill filed by *Joyce Christian* his widow and devisee, and *John M. Walker* administrator with his Will annexed.

Chancellor WYTHE, in May 1805, was of opinion, "that the plaintiff was entitled *in equity* to those parts "of the 2350 acres of land, represented in the map or "plat thereof, to which the parties have subscribed their "names, by the outside black lines; to which parts, *in* "law, the plaintiff would have been entitled, if a grant of "the said 2350 acres of land had been regularly signed "and sealed by the Governor, on the day and in the "year when the certificate that the said land had been "surveyed was returned to the Register's Office; that, "of the said 2350 acres, the plaintiff's brother *George* "was entitled, under the testament and last Will of "their father *James*, to one fourth part, (after excluding "what he had sold,) and, under the testament and last "Will of *James* the son, to the plantation whereon his "testator lived, and so much more as he meant to comprehend by the words, "*and all my lands thereunto belonging*," which are understood to include the land "from which the testator had ordinarily supplied the "land cultivated by him, with fences, felled timber to "build and repair houses, and cut fuel for his household, "and is not supposed to exceed 300 acres with the plantation; and that, leaving out of the said 2350 acres the "parts thereof sold by *James* the father, and the parts

“devised to *George* by *James* the son, as before mention-
 “ed, the plaintiff is entitled to the remainder.” He
 therefore perpetuated the Injunction, and decreed, “that
 “the said 2350 acres, after those sold by *James* the el-
 “der, and those devised by *James* the younger to his
 “brothers *John* and *George* shall have been taken off, be
 “divided into four equal parts, to be laid out in con-
 “venient forms; that one of them, in which are not any
 “improvements made by the plaintiff, be allotted and de-
 “livered to the defendants who are children of the said
 “*George Christian*; that the plantation of the said *James*
 “the son, including therewith 300 acres of the circum-
 “jacent and contiguous land, also to be laid out in a con-
 “venient form, be allotted to the same defendants, child-
 “ren of *George Christian*; and that all the defendants
 “remain and stand seised to the use of the plaintiff, of
 “so much of three parts of the land, herein before de-
 “creed to be divided into four, as they hold respectively
 “within the black lines before mentioned; that
 “make the partitions hereby decreed, and report their
 “proceedings, in execution of this decree, to the Court;
 “and that the plaintiffs pay one half the costs, and the
 “defendants the other half.”

MARCH,
 1820.
 Christian's
 devise
 v.
 Christians
 and others.

From this decree all the parties appealed, except the
 defendants *Booth* and *Staples*.

The following was the decree of this Court.

The Court is of opinion, that the decree of the Court
 of Chancery is erroneous, which therefore is reversed,
 with costs. And the Court, being of opinion that this
 case is not embraced by the general principle laid down
 in the case of *Noland v. Cromwell*, because the rights of
 the parties could not have been adjusted by the Court of
Caveat, is therefore farther of opinion that the appellees
 are to be considered as holding under their patent in trust
 for the appellants according to the rights of each under
 the Will of *James Christian* the elder; and, for the same
 reason, the appellees *Staples* and *Booth* ought to be con-
 sidered as trustees according to the rights of the parties.
 It is therefore adjudged, ordered and decreed that the ap-
 pellees *James, Elizabeth, Charles and Sally Christians*,

Maxcy,
1820.

Christian's
devisee

v.
Christians
and others.

be perpetually enjoined from proceeding to enforce the judgment at law in the Bill mentioned, against the appellant *Joyce Christian*, for so much of the lands comprehended in the surveys of 123 and 390 acres, as lies above the red dotted line laid down in the connected plat filed in this cause, and whereon *John Christian's* house stands; and that they do convey the same to her, in fee, with special warranty:—but the operation of this Decree is to be suspended until she shall convey to them, in fee, and with special warranty, an undivided fourth part of the 400 acres of land on Stonewall creek, granted to her testator, and of any other tract or tracts of land granted to him, or to her, under and by virtue of any entry or entries, survey or surveys, made by *James Christian* the elder, prior to the date of his Will, and which are not laid down in the said connected plat; or otherwise compensate them therefor; and that the said appellees be quieted in the possession and enjoyment of all the residue of the lands granted to them by the patent, in the Bill and proceedings mentioned, and also in the several tracts of land adjoining thereto, for which patents issued to *James Christian* the younger, (and which the Court is of opinion *were by him devised to their father George Christian,*) quit of the claim and demand of the appellant *Joyce Christian* and all persons claiming under her; and that each party do pay their own costs in the Court of Chancery.

And it is further adjudged and decreed, that the Bill, as to the appellees *Drury* and *Samuel Bell*, be dismissed, as to whom the general principle decided in the case of *Noland v. Cromwell* applies; and that the appellants pay to them their costs in the said Court.

And it is farther adjudged, ordered and decreed, that, as to the appellees *Staples* and *Booth*, the cause be remanded to the Chancery Court, with directions to that Court to permit the appellant *Joyce Christian*, if so advised, to amend the Bill as to those appellees, and to permit the appellees *James, Elizabeth, Charles and Sally Christians*, or such of them as may be advised to do so, to unite as plaintiffs in this suit, as claimants of

a moiety of the 400 acre survey, made by *James Christian* the elder on the 26th day of February 1747, and transferred to *John* and *George Christian* on the 13th day of December 1771, by memorandum in the Surveyor's books, and which survey is embraced in the patent granted to those appellees; in order to a final decree between those parties.

MARSH,
1820.
Christian's
devisee
v.
Christians
and others.

Stone against Ware and Smith.

Decided,
March 22d,
1820.

ON the 7th of January 1805, *William I. Stone*, with *Jesse Hughes* his surety, was indebted to *John Ware*, by execution upon a forthcoming bond, in the sum of 230*l.* 13. 0*½*: *Ware* was indebted to *Charles Smith*, by bond for 351*l.* payable February 10th, 1806. Under these circumstances, *Ware* applied to *Stone*, with the execution (which was in his own hands,) and said he would not deliver it to the Sheriff, provided *Stone* would allow him fifteen per centum per annum, upon the 230*l.* 13. 9*½*, from the 9th of January 1805, to the 10th of February 1806, and get his father *Hezekiah Stone* to become principal in a bond to *Charles Smith* for payment of the 351*l.* on the last mentioned day; and that he (*Ware*) would pay the difference between the two debts. To

1. A creditor, by threatening to have execution levied, induced the debtor to allow him 15 per Centum per annum, upon the debt, and to give a bond as principal obligor, in which the creditor joined as surety, payable at a future day, to a third person,

son, to whom the amount was bona fide due, and who knew nothing of such usurious agreement. The debtor was entitled to no relief in equity against such innocent third person; not even by a decree to compel the usurer to pay him the debt, in discharge of the complainant.

2. The usurious arrangement being proved; and the bill not exhibited for a discovery; the Court gave relief against the Usurer, upon the terms of the debtor's paying him the principal justly due, with legal interest.

3. The circumstance that the amount of the usurious gain was less than one hundred and fifty dollars, and that relief ought to be given to that extent only, was not considered, on an appeal from a Superior Court of Chancery, as furnishing a valid objection to the jurisdiction of this Court; the subject in controversy upon the appeal being the whole debt and interest, which amounted to more than \$150.

4. A sum allowed a creditor "for services rendered and settled," (but not specified,) amounting to nine per Centum per annum, was considered usurious; it appearing that the pretended services were rendered only in exertions to secure the debt for the creditor's own benefit.

MARSH,
1820.

Stone
v.
Ware and
Smith.

this proposal, *William I. Stone*, to prevent the levying of the execution, assented. *Ware*, being told that such agreement was usurious, drew up an account of the transaction, in which he charged interest at the rate of *six per Centum per annum* on the amount of the execution, and added thereto an item of 23*l.* 11. 8., "*for sundry services done and settled;*" (without saying what those services were; which sum amounted exactly to *nine per centum per annum* on the said amount;) producing, with 81*l.* 9. 2*d.* to be paid by himself to *William I. Stone*, a total of 35*l.* for which the bond of *Hezekiah Stone* was taken, payable on that day, with *William I. Stone*, the said *Ware*, and *George Holman* his sureties, to *Charles Smith*, who was altogether ignorant of the usury. On this bond, *Smith* obtained a judgment at law; whereupon, a Bill for an Injunction, and for general relief, was filed in the Superior Court of Chancery for the Richmond District, by *William I. Stone* and *Hezekiah Stone* against *Ware* and *Smith*; stating the foregoing facts, with their accompanying circumstances; and alledging that the complainant *Hezekiah Stone* took it for granted that *Ware* was to pay his son the real difference between the execution and the required bond, and knew nothing of the usury until after the judgment upon the bond was obtained against him.

Ware answered; insisting that his aforesaid charge for services was not usurious; but submitting to account. This answer was adjudged insufficient; and he filed another, in which he said there had been much talk about 15 per cent., and the sums charged might have been ascertained by a computation at that rate; but that the said sum of 23*l.* 11. 8 was allowed him for his services in riding about, at a very inclement season of the year, with great danger to his health, and exerting himself to have the arrangement in question concluded, for the relief of the complainant *William I. Stone*, who considered it very beneficial to him, and declared himself perfectly satisfied with it.

Smith's answer denied any knowledge of the Usury, and declared that the bond to him was fairly taken, for the price of a negro sold to *Ware*.

MARCH,
1820.

Stone
v.
*Ware and
Smith.*

The facts stated in the Bill, against *Ware*, were supported by affidavits; but no objection appeared to *Smith's* conduct in any respect. It was proved that *Ware* paid to *William I. Stone* the difference, amounting to 81l. 9. 2½ as aforesaid.

Chancellor TAYLOR dissolved the Injunction, and afterwards dismissed the Bill altogether; "being of opinion that however clear it may be that the defendant "*John Ware* extorted usury from the plaintiffs in the transactions in the bill mentioned, yet their remedy was at law, and not in equity; since no discovery is sought by their Bill."

The case was brought before this Court by a Petition of appeal.

Bouldin for the appellants, made four points on the subject of the Court's jurisdiction; 1st, that *Hezekiah Stone* shewed sufficient cause for not defending the suit at law, in that he was ignorant of the fact:—on him the transaction was a fraud; and a party's discovering a material fact after judgment, is good ground for relief in equity.

2d, The ordinary rule, that a party shall not apply to a Court of Equity for the relief he might have had at law, does not obtain in cases of Usury. The party oppressed by an Usurer is not *particeps criminis*, and therefore might, always by bill in Chancery, and now by action at law may, recover back the usurious interest, if paid: (a) and this, even though the money were paid in obedience to a judgment or decree. (b) But the Statute against Usury gives the Court of Equity express jurisdiction, which is not waived by failing to plead at law.

(a) *Bosanquet v. Dashwood*, Cases Temp. Talb. 38; *Smith v. Bromley*, *Douglas*, 696.

(b) *Moore v. Battie*, Amb. 371.

3d, In this case, the complainants had no remedy at law; the bond to *Smith* being for a *bona fide* debt due him, without the least taint of Usury in it. The inducement, by which *Smith's* debtor obtained other persons to become bound for the debt, being unknown to him, could not avoid the bond. (c)

(c) 7 Bac. 201, citing 7 Mag. 119.

MANCH,
1820.

Stone
v.
Ware and
Smith.

4th, The defendant *Ware*, by his answer submitted to an account, and can not afterwards object to the jurisdiction of the Court. That account should be audited, allowing only *legal* demands.

On the *merits*, the Usury is proven by the Answer of *Ware* himself. Admitting his own statement to be correct, the services charged were rendered, only in securing and collecting the debt on the execution, *for his own benefit*:—the sum allowed was therefore clearly usurious. (d)

(d) *Scott v.*
Brest. 2 Term
Rep. 238.

Stanard contra.—It being admitted on all hands that the bond to *Smith* was free from all taint of usury as to him; it follows that, whatever may have been the nature of the contract between *Stone* and *Ware*, no relief ought to be given against *Smith*. (e) The Injunction was therefore properly dissolved, and Bill dismissed, as to *Smith*, who was causelessly made a party; and the case ought to be considered as if he had never been before the Court.

(e) *Ellis v.*
Warnes Cro.
Jac. 32; Hus-
sey v. Jacob,
1 Salk. 344;
Anon., 2
Mod. 279;
Cuthbert v.
Haley, 8
Term Rep.
390; Parr v.
Eliason, 1
Bast, 92.

The testimony introduced to prove the Usury as to *Ware*, is by no means conclusive: but, let it be conceded that the contract was usurious; the question still arises, was *Stone* entitled to come before any forum, at the time this suit was instituted? Not a *legal forum*; because he had paid nothing in pursuance of the contract:—he had merely entered into an obligation, jointly with the other party to the usurious agreement, to pay money, and would be puzzled to frame an action that he could successfully prosecute at law. The like objection holds to the suit in equity.

But, suppose the money had been paid, could the Court of Equity hold jurisdiction of this case? That jurisdiction is twofold;—1st, under the Statute against Usury; and, 2d, under the general principles that regulate those Courts in the application of their powers.—The jurisdiction is not sustainable by virtue of the Statute; 1st, because the Bill is not a Bill for *discovery*; and, 2dly, because the statutory remedy, according to the fair interpretation of the Statute, is to be used, only where there is some outstanding contract, or security, on usurious consideration, from the enforcement of which

the plaintiff seeks protection; and not to recover back from the defendant money paid to, or contracted to be paid for, him. Neither can such jurisdiction be sustained upon general principles. When the powers of Courts of Equity are applied to usurious transactions, they are subject to the same limitations as in other cases. The first limitation is, that relief is not to be given where the plaintiff seeks no discovery, or can prove his case without any; which is the case at bar. The decision in *Marks v. Morris*, 2 *Munf.* 407, is not opposed to this rule; for that decision is based on the consideration that the usurious contract was one to oppose which the plaintiff in equity had no day in Court.

Marks,
1820.

Stone
v.
Ware and
Smith

Indeed, there are but three classes of cases where relief is or can be sought, in Equity, from an usurious contract or it's effects:—1st, where there is some outstanding obligation or security which the holder may enforce at law by suit, and which the plaintiff in Equity seeks to have surrendered:—2d, where the contract has been carried into effect, the usurious gain paid, and the plaintiff seeks to have it refunded:—3d, where the contract is of such a nature that it may execute itself, or at least be executed without suit; so that the party charged by it has no day in Court to shew it's usurious nature in avoidance of it.

The first class falls properly under the Statute, and the Bill is a Bill of *discovery*. At all events, the case at bar does not belong to it. In the second class, the bill must also be a Bill of *discovery*; for the party who would prove his case, would prove himself out of Court. The case at bar does not belong to it, because the money has not been paid, and because the plaintiffs do not rely on a discovery. The third class, though one in which it is not necessary that the Bill should be for a discovery, yet, obviously, does not comprehend the case now in question.

Having considered the question of jurisdiction of the Court below, with respect to the nature of the plaintiff's claim, I will bestow one moment on the question of the jurisdiction of this Court in relation to it's amount.

March,
1820.

Stone
v.
Ware and
Smith.

Suppose the fact of Usury established; the objection, that the money has not been paid, out of the way; and the jurisdiction, as to the subject matter of the claim, clear; what is that claim? 28l. 11s. 8d. in it's amplest dimensions! This is all that has been stipulated to be paid for usury, or that has been paid, if Mr. Bouldin will have it so; all that the plaintiffs can now, or could in the Court below, pretend to claim, after having (as before remarked,) in substance, confessed there, that they had no right to relief against the bond or judgment! This sum will not support the jurisdiction of this Court.

The cause was again argued, by the Court's direction; upon two questions; 1st, whether the contract was usurious; and 2dly, if so, whether there must be a forfeiture of the whole debt, or only of the usurious interest.

Bouldin. 1. The pretence in this case of compensation for services rendered and settled, is a mere shift
(f) 2 Term to evade the Statute. (f)
Rep. 238.

2. The plaintiffs are entitled to protection to the full amount of the bond to *Smith*, in which they were sureties for *Ware*, who in reality was the principal obligor, although the name of *Hezekiah Stone* was first inserted and subscribed. By this simple contrivance, the Usurer has made the borrower paymaster of a debt of his. If it can not be defeated, the borrower is bound hand and foot, and without remedy. The question before the Court is, *who ought to pay the bond?* I answer, the *real debtor*, who is *Ware*. *Smith*, I admit, is entitled to his money; but he ought to get it, not from *Stone*, but from *Ware*. The Court, since all the facts are before it, may fix the debt on the right person. The order of the signatures to an obligation, though *prima facie* inducing a presumption that he whose name is first signed is the principal obligor, is not conclusive. It is only by the usurious arrangement, that this differs from the common case of a surety seeking to make his principal responsible in the first place.

The present case is stronger than that of *Marks v. Morris*. In that case, if a suit had been brought at law to recover the property, the Usury might have been

MARCH,
1830.Stone
v.
Smith and
Ware.

pleaded:—but here, by fraudulent trick and contrivance, defence at law was precluded, and no remedy left but in Equity; for *Stone* could not plead usury to the bond, which was fair and not usurious.

The ground I have taken is substantially supported by the decision of this Court, in *West v. Bejsches*, 5 *Mansf.* 194, that every man's proper debts ought to be paid out of his own estate. In *Marks v. Morris* it was decided that a Court of Equity will frustrate every scheme by which the Usurer has prevented the plaintiff from taking advantage of the usury at law. The Court ought therefore to decree that *Ware alone* shall pay the whole amount to *Smith* the obligee.

Standard. Whether the contract now in question was usurious, or not, is a mixed question of law and fact. It appeared to me that the case of the plaintiffs was not made out in point of fact: but let us suppose the facts ascertained, is it necessarily an usurious contract? I contend it is not.

Is it usurious for a party owing a debt payable at a distant day, to obtain, in consideration of present payment, a deduction to a greater amount than legal interest? (g) The substance of this contract was, that *Ware*

(g) *Barclay v. Walmsley*, 4 *East* 55.

gave a present claim, for payment of a demand upon him at a future time, with a particular rebate from that demand. If *Stone* had gotten *Ware's* bond to *Smith*, he might have sold it to *Ware*, at a large discount, for his execution against him; and such discount would not have been usurious. The case before the Court is the same in substance.

But if there has been Usury in this transaction, what is the measure of relief which the Court of Equity can give? The appellants call on the Court to enforce a forfeiture of the whole debt! The province of a Court of Equity is not to enforce but to relieve against forfeitures, by mitigating the rigour of law. It's peculiar modes of investigating facts, for this mild and benignant purpose, are most salutary, but, in alliance with a power to enforce, instead of mitigating forfeitures, would be truly formidable. From *Totkhill* to *Vesey* and *Beams*, there is

March,
1820.

Stone
v.
Smith and
Ware.

no example of that Court's granting relief, by directly or indirectly inflicting a forfeiture on the defendant.

The rule in equity is, that the borrower is bound to repay the principal with legal interest, before he gets relief for the excess; for he that seeks equity must always do equity. Even where the *defendant* has been guilty of fraud, by taking advantage of youth and inexperience, he shall yet have equity; and that is principal and lawful interest. (h) The maxim, that he who hath done iniquity shall not have equity, applies only where he is *plaintiff*. (i) Even Courts of law, wherever they have discretionary power to subject the party to terms, follow a similar rule. (k) Where usury has been discovered, and the usurious securities destroyed, an express promise to pay the principal with legal interest, has nevertheless been supported. (l)

(h) 1 *Fenbl.*
138.

(i) *Bo-*
vanquet v.
Dashwood,
Cas. Temp.
Talb 38;
Scott v. Nes-
bitt, 2 Bro.
Ch. cases,
649.

(k) *Fitz-*
roy v. Gil-
ham, 1 Term
Rep. 153.

(l) *Barnes*
and others
v Hedley &
Conway, 2
Taunton's
Rep. 184.

Mr. *Bouldin* contends that the measure of relief should be the amount of the bond from *Ware* to *Smith*; although he acknowledges that that bond was fair and conscientious. He wishes a Court of Equity to act as supplemental to a Court of law, to enforce a penalty which the Court of law can not enforce; to make that usurious in equity, which is not usurious at law; on the ground that the party has so sheltered himself that the Court of law can not take hold of him! He says that the object is not to enforce a forfeiture in his client's favour; not to rob *Ware*, but merely to hold him fast, and compel another to rob him! *Smith*, it seems, is to be prohibited from recovering any thing from the complainants; but the whole liability for the debt is to fall upon *Ware*! Is not this, to all intents and purposes, enforcing a forfeiture against him?

If there be usury in this case, to what does it attach? Not to the debt to *Smith*, as Mr. *Bouldin* admits. The original fair contract is not infected by the subsequent usurious agreement:—the latter alone is to be set

(m) *Gray v.*
Fowler, 1
Mon. Bl. 462.

aside. (m) And that agreement applies only to the 23^d. 11 8; a sum too small to give this Court jurisdiction.

Bouldin in reply. Arithmetical calculation supports the testimony that the sum allowed amounted to fifteen

per centum per annum; and *Ware's* own answer admits the same thing. But Mr. *Stanard* says, this is not usury. It would require all his ingenuity to make this case resemble that of *Bardley v. Walsmsley*, 4 *East*, 55. It is the plain case of a debtor, hard pressed by a creditor, agreeing to pay, for the sake of forbearance, *nine per cent.* in addition to the lawful interest, upon an arrangement that the payment should be made to a creditor of such creditor. The only object of this Bill is to deprive the usurer of the advantage obtained by him, by which he deprived the borrower of the opportunity of making the defence at law. The principle is the same with that upon which the Court went in *Marks v. Morris*. The Usurer there, by resorting to a deed of trust, gave the debtor no opportunity at law to plead the usury. So, here, *Ware* contrived to get *Stone* bound with him in a bond to *Smith*, and in such manner as to make *Stone* apparently the principal debtor; to which bond the plea of usury could not be put in. If *Ware* himself had not been one of the obligors in that bond, I should have had some difficulty; but (as it is,) the Court, to give complete effect to the Act of Assembly, may compel him to pay the debt to *Smith*, which is his own debt;—may make him the principal obligor, which in fact he is. Otherwise, the Act might always be evaded by the contrivance of binding the borrower to pay the money to a creditor of the lender, instead of to the lender himself. Allow the usurious agreement *effect*, and my client is the principal debtor to *Smith*; otherwise not.

An Usurer is not to be let off more lightly on the ground that the usury is not acknowledged in his answer, but fixed upon him by *proof*. Under the principles of *Bosanquet v. Dashwood* referred to by Mr. *Stanard*, and all the other cases here and in England, the Court of Equity is always open to relieve against fraud, usury and extortion.

The Court's opinion was delivered as follows.

The arrangement by which the appellants were induced to give their bond to the appellee *Smith*, was indeed tainted with Usury, but it is not even alledged that *Smith*

MARCH,
1820.

Stone
v.
Smith and
Ware.

MARCH,
1820.

Stone
v.
Smith and
Ware.

was privy thereto, or had any knowledge thereof. He only agreed to accept that bond in lieu of another, which he held for a just debt. The authorities seem to bear us out in saying, that, under these circumstances, the bond as to *Smith* is not to be impeached of usury, and he is to get full payment thereof. Had this knowledge been charged and proved upon *him*, the case might have been otherwise. In relation to the appellee *Ware*, however, the usurious arrangement being proved, the appellants are entitled to relief. That relief is to be upon the terms of paying the principal justly due to him (*Ware*) with legal interest. The decree is therefore correct as it relates to *Smith*, but is erroneous as to *Ware*, to the extent of the usurious gain received by him; the difference between the two debts having been already received by *Stone* the younger.

The decree is to be consequently reversed, and the cause remanded, to have an account taken, and a final decree rendered pursuant to the principles of this decree.

Decided,
March 23d,
1820.

Colquhoun against Atkinsons.

1. In general, a deed is to be taken as having been executed on the day of its date, unless it appears to have been on some other day.

JOHN LE MESSURIER of the town of Petersburg, on the 9th day of November 1804, executed a deed, conveying a tract of land in Dinwiddie county, to *Robert Atkinson*, in trust, for the purpose of securing the payment of a debt of 1690*l.* 4. 10 to *Thomas Atkinson*; with a clause empowering the trustee to sell the land, if the debt should not be paid on or before the 1st day of Feb. 1805; to pay the debt, with lawful interest, &c.; and the

2. The testimony of the person who executed the deed, was received as fixing the time when it was executed; notwithstanding the testimony of two witnesses to his acknowledgment to the contrary *when not on oath*; he being entirely *disinterested* between the parties, and the falsehood of his evidence being *not probable* under the circumstances of the case.

3. A creditor by mortgage or deed of trust, has not a right, *without a written agreement, to tack to such mortgage or deed of trust a note or bond of the debtor, in exclusion of another mortgage or deed of trust, bearing date either before or after such note or bond.*

surplus, if any, to pay to the said *Le Messurier*, or his order. This deed was *re-acknowledged* the 9th of July, and admitted to record the 16th of December, 1805.

MANOR,
1820.
Colquhoun
v.
Atkinson.

A bond was given by the said *John Le Messurier* to *Thomas Atkinson*, May 16th 1805, for 75*l.* payable the 1st of September following. A negotiable note, for the accommodation of the said *Le Messurier*, amounting to two thousand dollars, was endorsed by the said *Thomas Atkinson*, July 25th 1805, and paid by him at Bank, on the 28th of November ensuing.

On the 15th of July 1805, the said *Le Messurier*, being indebted to *Walter & Thomas Colquhouns* in a large sum by bond, protested bills of exchange, and indorsements of negotiable notes, conveyed the same tract of land, with some other real property, by deed of trust to *Robert Colquhoun* for their indemnity, with power to the said trustee to sell, &c.; which deed was recorded December 16th 1805. By another deed of trust, dated the 10th of August 1805, the said *Le Messurier* conveyed to the same trustee, for the benefit of the same creditors, sundry slaves. This deed was not attested by the witnesses to the other deed, but by other persons, and was recorded the 2d of December 1805.

In February 1808, *Robert Colquhoun*, *Walter Colquhoun* and *Thomas Colquhoun* filed a Bill in the Superior Court of Chancery for the Richmond District, stating, in substance, that, between the 9th of November 1804, (the date of the first mentioned Deed,) and the 3d of April next ensuing, *John Le Messurier* paid *Thomas Atkinson* 840*l.* of the said sum of 1690*l.* 4. 10; leaving due thereof only a balance of 850*l.* 4. 10, principal money, with the accrued interest; that the plaintiffs were advised that their lien by virtue of the Deed of July 15th 1805, (the said Deed of November 9th 1804, in favour of *Atkinson*, having not been recorded within eight months from that date, but only *re-acknowledged* on the 9th of July 1805,) took effect immediately, subject to the payment of the said balance of 850*l.* 4. 10, with interest, to the said *Thomas Atkinson*, for which, and no more, the trustee *Robert Atkinson* was authorised to sell the land; but that

MARCH,
1820.

Colquhoun
v.
Atkinsons.

Thomas Atkinson pretended he was entitled to *tack* his claims, under the bond aforesaid for \$250, and negotiable note for \$2000, to the said balance secured by the deed of trust in his favour, altho' there was no *written* agreement between him and *Le Messurier* that the land should be bound for *either* of those claims, and as to the said *bond*, there was no such agreement at all. The plaintiffs considered it an established principle, that a prior mortgagee, having also a claim by bond, shall be postponed, as to the bond, to a second mortgagee, or assignee of the equity of redemption, having no notice of such bond claim; (in which situation these plaintiffs stood;) that, tho' the *heir* of the mortgagor would be compelled to pay the bond, as well as the mortgage, before he would be permitted to redeem, yet subsequent incumbrancers and creditors would not be affected by such bond, but their claims would be preferred thereto. They also contended that, where the legal estate is vested or standing out in a trustee, *equitable* incumbrances must be paid *according to their priority in time*; that the claim of the plaintiffs was equally just with, and *prior in point of time* to, the two claims attempted to be *tacked* by *Thomas Atkinson* to his said deed of trust, and therefore ought to be preferred. The trustee *Robert Atkinson* had nevertheless sold the land, (tho' forbidden by the plaintiffs to do so,) and had actually paid or threatened to pay *Thomas Atkinson* the said two sums of \$2000 and \$250, in preference to their said claim. They prayed therefore that the said *Le Messurier* and *Atkinsons* be made defendants to the Bill; that the said trustee, if he had not paid the said sums to *Thomas Atkinson*, or the said *Thomas Atkinson* if he had received them, should be compelled to pay the same to the plaintiffs; and for general relief. The bill was afterwards dismissed as to *Le Messurier*, for want of prosecution.

Thomas Atkinson, by his answer, averred that, on the 25th of July 1805, when he endorsed for *Le Messurier* the note for \$2000, it was distinctly agreed between them (tho' not in writing) that the deed of trust in his favour should remain a security for the said \$2000

MARCH,
1820.

Colquhoun
v.
Atkinson.

and for all posterior money transactions in which the said *Le Messurier* should become indebted to him; that, but for such agreement, he would not have made the indorsement for a man whose circumstances he knew at the time to be very much embarrassed; that the respondent at that time received no information or hint, and had no reason to suspect, that the said *Le Messurier* had incumbered, or intended to incumber, the land to any other person; and in truth he could prove by *Le Messurier's* own acknowledgment that he then had executed and delivered no deed of trust to the plaintiffs; the deed for their benefit, though bearing date on the 15th of July 1805, having been actually executed and delivered by him on the tenth of August afterwards, and not before. The respondent insisted that, since the claim of the plaintiffs rested on a conveyance from *Le Messurier*, who had before conveyed the same estate to his trustee *Robert Atkinson*, and therefore would not have been permitted to redeem without paying whatever he owed to the respondent, the said *Le Messurier* could not impart to the plaintiffs a right which he did not possess himself; that the doctrine contended for by the plaintiffs did not touch the present case, of an additional sum agreed to be secured at the time it was lent, by a pre-existing mortgage, when too there was no other lien on the property; and that the existence of a second Mortgage is no bar to the first mortgagee's being secured, from the mortgaged subject, for money advanced after the first mortgage was executed, if the first mortgagee had no notice of the second mortgage at the time of the advance,

Robert Atkinson, by his Answer, acknowledged that, being called upon by *Thomas Atkinson*, he advertised and sold the land as authorised by the deed, and paid to the said *Thomas* the amount which was due after deducting such credits as the said *Thomas* thought proper to allow; to wit 1477*l.* 14*s.* 9*d* $\frac{1}{2}$; and the balance of the purchase money, after deducting costs, &c., to wit, 602*l.* 16*s.* 2*d* $\frac{1}{2}$, was paid to the plaintiffs, by virtue of an order drawn in their favour by the said *Le Messurier*.

The deposition of *Le Messurier* was taken by the plain-

MARCH,
1820.

Colquhoun
v.
Atkinson.

tiffs, in which he stated, (among other things,) that the Deed of Trust in their favour, dated the 15th of July 1805, was drawn by himself on the day of it's date, *without the knowledge of any person whatever*, and remained in his possession, *but a few days, not exceeding a week*, until he should have an opportunity of delivering it to *Walter Colquhoun*; which he then did; and it had not been in the deponent's possession since: that the plaintiffs did not speak to him of the previous incumbence to *Atkinson* until his failure became public; and *he was pretty sure he did not inform Walter Colquhoun, of any of his transactions with Atkinson, before November 1805: that, when he executed the bond for \$230 to Atkinson, there was no understanding or agreement whatever, expressed or thought of by him, that the payment thereof should be secured in any shape; though, after his failure became public, it was very possible that, on Atkinson's becoming urgent, he might assent to the said bond's being tacked to the deed of trust in his favour, so as to be equally protected by it; but it was expressly understood and agreed, when Atkinson lent the deponent the note for \$2000, that the deed of trust should be valid as to the amount of that note, and that only; for the deponent then did not expect any farther loan from Atkinson.*

The depositions of two witnesses in behalf of the defendant, proved acknowledgments by *Le Messurier* that the deed of trust conveying the land to *Robert Colquhoun* for the benefit of the plaintiffs, *was not signed and acknowledged by him until the day when he signed and acknowledged the deed for the negroes.*

Chancellor TAYLOR decreed, as follows:—

" This cause came on this day to be heard on the Bill,
" Answers, Exhibits and examinations of witnesses, and
" was argued by Counsel; on consideration whereof,
" both parties disclaiming the necessity of making *John*
" *Le Messurier* a party in this cause, and the Court being
" of opinion, as the plaintiffs in their examination of him
" admit that the deed from him to the plaintiffs, dated
" the 15th of July 1805, *was not acknowledged before*
" *witnesses 'till about the tenth of August next ensuing,*

“ this should be regarded as the date from which that
 “ deed was to take effect: and, as *John Le Messurier*
 “ could not, at the time of the delivery of that deed to
 “ the plaintiffs, have redeemed the trust without payment
 “ of the said two thousand dollars, it follows that the
 “ plaintiffs, claiming under the said *John Le Messurier*,
 “ can not be in any better condition in relation
 “ to that sum: but, as the said *John Le Messurier*
 “ might at that time have redeemed the said trust with-
 “ out payment of the said two hundred and fifty dollars,
 “ which fell due by bond on the first of September
 “ following, it also follows that the plaintiffs claiming
 “ under him have the same right, doth adjudge, order
 “ and decree that the said *Thomas Atkinson* pay to the
 “ plaintiffs the sum of two hundred and fifty dollars,
 “ with interest thereon from the 1st day of September
 “ 1805 ’till paid, and the costs by the plaintiffs expended
 “ in prosecuting this suit.

MARCH,
 1820.
 Colquhoun
 v.
 Atkinson.

From this decree, *William Colquhoun* executor of *Robert Colquhoun* surviving partner of the original plaintiffs, (as to whom the suit had been revived,) appealed, to this Court.

David Robertson for the appellant.

Leigh, Call and Wickham for the appellees.

Judge BROOKE delivered the Court’s Opinion as follows:—

The Court is of opinion, that the Deed from *Le Messurier* to *Colquhoun*, dated on the 15th of July 1805, is to be regarded as executed on that day, or within one week succeeding it. The rule is, that a deed is to be taken to be executed on the day of it’s date, unless it appears to have been executed on some other day. The testimony of *Le Messurier* fixes the execution within the period last mentioned; and the testimony of the two witnesses, to his supposed acknowledgment to the contrary when not on oath, is not considered by the Court as outweighing his testimony. He is entirely disinterested, and no bias is imputable to him. That the deed in question was executed with the deed for the personal estate on the tenth day of August in the same year, as is stated by the wit-

MARCH,
1820.

Colquhoun

v.
Atkinsons.

nesses to have been acknowledged by *Le Messurier*, is not probable. The contrary would be inferred from the circumstance that they are *witnessed by different persons*.

The note that is claimed to be *tacked* by the appellee to his deed of the 9th of July 1805, is dated on the 25th of that month, and of course is posterior to the deed to the appellant; and the claim of the latter under that deed must be first satisfied, unless it can be repelled by the right asserted by the appellee to *tack* the two thousand dollars due on the note to the balance due on his deed of the 9th of July 1805. On this question the Court, (not deciding in what respects deeds of trust may be considered to differ from mortgages, and putting them on an equal footing as regards the present controversy,) is of opinion that the right of the appellee, thus asserted, can not be sustained.—In the case of *Shepherd v. Titley*, 2 Atk. 348, the attempt was to *tack* a loan of 800*l.*, upon bond, to a prior mortgage on which 800*l.* had been paid, *in exclusion of a subsequent mortgage*; but the Court held that a bond could not be *tacked*, without a written agreement; not being a *lien* on the *land*, except as against the *heir*, *to prevent circuity of action*; that the new loan could not be considered as a part of the old debt; there being a receipt for the 800*l.*, and a stoppage of the interest. In the case of *Heams v. Bance*, 3 Atk. 630, the same doctrine is advanced; and the Court decided that, even against creditors under a devise to pay debts, the bond was only a claim upon the *general assets*, and could not be *tacked* to a prior mortgage. The cases referred to, in which a deposit of Title-papers, explained by oral testimony to be a pledge for the payment of money loaned, has been held to amount to a mortgage, and to give priority to a subsequent lien on the property, the Court is of opinion do not apply. If they did, the Court would not incline to countenance decisions which the English Judges complain of, as having opened the door to frauds which the Statute intended to close. In these cases the Courts in England have considered the delivery of title-papers as *prima facie* evidence of the part execution of a contract, and the foundation for an explanation of the nature of it

by parol evidence. (a) The giving the note in this case for \$2000, has laid no such foundation. It can not be pretended that *per se* it is any evidence of an intention to create a *lien* on any specific property; and to let in parol evidence to that effect would completely defeat the object of the Statute against frauds in this respect. The case of *Williamson v. Gordon*, 5 *Munf.* 257, the Court is of opinion, under this view of the case, does not touch the present question. *Williamson* had purchased the property from the Trustee, had his contract to make him a title, and had paid the purchase money to the creditors of *Sinclair*, without notice of the subsequent *lien* of *Gordon*. His claim was not to a *lien* on the property, but to a legal title to the property itself; and this Court held that, having that claim, he ought to be considered as holding the legal title.

MARCH,
1820.
Colquhoun
v.
Atkinsons.
(a) 2 Bro.
Ch. cas. 269.

Without resorting, therefore, to the date of the deed to Colquhoun as giving him priority, the Court is of opinion, that neither the Bond, nor the note for \$2000, can stand in the way of the claim of the appellant under that Deed.

The Decree of the Chancellor is on these grounds reversed; and the cause is to be sent back, to be proceeded in according to the principles of this decree.

Tomkies' Executor against Downman.

Decided,
March 28th,
1820.

MORGAN TOMKIES presented to the Judge of the Superior Court of Chancery for the Williamsburg District,

1. Not
more than
one fine can
legally be

imposed on the Sheriff, or other officer, for failing to return *one execution*.

2. The plaintiff at law having recovered, by successive judgments, *many fines*, against the Sheriff for failing to return *one execution*; to a greater amount, in all, than the execution itself, *with his extra costs added thereto*; it appearing also that the execution was *lost*, and therefore could not be returned; that the Sheriff's failing to make defence at law against any of the judgments after the first, proceeded from ignorance of the true construction of the Act of Assembly; and that, in relation thereto, there was a general delusion among the citizens of the Commonwealth; the Court of Equity gave the Sheriff relief, by Injunction prohibiting any farther recovery against him on account of his failure to return the *said execution*; and this, although it appeared he had received and applied to his own use a part, and probably the whole, of the money upon the execution.

MARCH,
1830.

Tomkies'
executor
v.
Downman.

a Bill stating that, some time in the year 1808, during which the plaintiff was High Sheriff of Gloucester County, *Robert Downman* obtained a judgment in the County Court of Sussex against *George Ball* for \$699.56 Cents, with interest and costs; that the said *Downman*, to whom the execution on the said judgment was delivered, alledged that he sent and delivered it to the present complainant on the 19th day of March 1808, which was not the fact; but the complainant was willing to admit and did believe that the same was *delivered* to one of his *deputies*, and *shewn* to himself when confined to his bed by sickness: that under the impression that this was the fact, he did *receive* from the said *George Ball*, upon the settlement of a large account between them, *part* of the money due on the said execution, *with a promise speedily to pay the balance*; but, upon enquiry and strict examination, the execution could never be found: that the said *Downman* gave the complainant a notice to move against him for a fine for not returning the said execution; and the complainant, well knowing the execution had never been delivered to him, did not appear to defend the same, *relying upon a failure of proof on the part of the said Downman on his motion*; but, to his surprise, a judgment was obtained upon that notice, and execution issued, which the complainant paid: that other fines were levied, on similar notices, for not returning the same execution against *George Ball*, (so long lost, of which fact the complainant informed the said *Downman*), to the amount of \$1975 and some Cents; all which the complainant actually paid: that the said *Downman*, (who was made defendant to the Bill,) intending to injure and ruin the complainant, upon new notices obtained judgments for other fines against him for the same cause, to the amount of \$500 and upwards, and would continue to obtain judgments and issue executions during the continuance of time, it being impossible for the complainant to return an execution he never saw, and which, if ever received by his deputy, was long ago lost.

The prayer of the Bill was, for an Injunction to the judgments remaining unsatisfied; an account of the pay-

amounts by the complainant; a decree for such sums as the Court should think he had improperly overpaid; and for general relief.

Chancellor NELSON refused to grant the Injunction, which, however, was granted by a Judge of this Court.

The defendant by his answer stated, that he employed a young man in the County of Sussex to carry the execution against *George Ball* to the County of Gloucester, and deliver it either to the High Sheriff or to one of his deputies; that it was delivered to one of those deputies, was repeatedly proved in Sussex County Court, and indeed was admitted by the Bill; and such delivery was as obligatory as to the Sheriff himself. The defendant remarked, that from the Bill it appeared, that the money was actually received of *Ball* by the complainant. Could the loss of the execution avail any thing? This respondent had always been ready to receive the amount of the execution, and give a receipt against it, which would have been equal to a return; but such a proposition made by him, in the presence of the clerk of Sussex Court, the first time he ever saw the complainant, was not complied with by the latter. The respondent delayed taking any step for some time after the return day, and did not proceed to give a notice 'till informed by *Ball* that the money had been made. He then sent the same young man to the complainant for the amount, who replied that the money was not then made, but would be shortly, when he would inform the respondent thereof. A considerable time having afterwards elapsed, without receiving such information, the respondent, being in great want of the money, sent the same person again for it. Upon his making the second application, the complainant enquired of the young man if he took a receipt for the execution; who answering in the negative, he was told by the complainant, he did not know when the money would be made. The respondent was then compelled to resort to coercive measures to enforce the return of the execution, and obtain his just rights; believing that the complainant did not intend to pay the amount, or return the execution, until compelled, relying (as was apparent on

Mason,
1820.

Femkies'
executor
v.
Downman.

MARCH,
1820.

Tomkies'
executor

v.

Downman.

the face of the Bill,) that, since no receipt had been given for the execution, a Court would not sustain a motion, for damages, on proof of the *delivery* thereof by the testimony of *one witness*. The respondent admitted that he had received, in the aggregate, *more than the amount of his judgment against Ball*; but, at the same time, stated that, in making these collections, he expended considerable sums in payment of extra fees to lawyers, expenses incurred in sending notices, executions, &c., against the complainant, to Gloucester County; and also had lost one of a pair of very valuable carriage horses, killed in making one of those trips; so that, in the *ultimatum*, he did not consider himself benefited much more than about the interest of his original debt and costs. He remarked that, if a Court of Equity were to interpose it's equitable jurisdiction in cases of this sort. public defaulters would make a performance of their duty a mere matter of pecuniary calculation: thus, if the complainant should be released from the payment of fines beyond the amount of the debt, (principal, interest and costs,) the law, which imposes a penalty for a failure in the performance of his duty, would be virtually annulled, and no public officer would hold in reverence the law.

With this answer, the defendant filed several affidavits, taken with due notice, by which his allegations, concerning the conduct of the complainant when applied to for the money due on the execution against *Ball*, and his own offer, in the presence of the Clerk of Sussex, to receive the amount thereof and give the complainant an acquittance, were in substance proved:—but it appeared that that offer was made after he had given the complainant notices, and obtained judgments against him, for fines to a large amount. A witness stated that, when the offer was made, “*Tomkies* replied, that he thought, as he “*had already paid nearly about double as much in fines as the amount of the execution, the Doctor (Downman)* ought to be satisfied: the doctor then told him, “*he never would give up the amount of the execution, “but would continue to give notices and move for fines*

“ against him and his securities *as long as they were*
 “ *worth a shilling*, unless he did return the execution, or
 “ pay the amount, as he had received a letter from
 “ *George Ball* stating that the money had been paid.”

MARCH,
1830.

Tomkies'
executor
v.

Downman.

The suit having been transferred to the Richmond District by virtue of the Act of Assembly, Chancellor TAYLOR, on the 17th of January 1815, directed an account to be taken by a commissioner, of the money actually paid by the plaintiff to the defendant for not returning the execution in the bill mentioned. The commissioner made a Report shewing that the amount of executions for fines, paid by the plaintiff to the defendant was \$1845 18 Cents, exclusive of the costs, which amounted to \$130 50 Cents; and that the defendant's execution against *Ball* being only for \$722, the sum overpaid (excluding the costs) appeared to be \$1123 18 Cents, and, if the costs were included in the calculation, \$1253 68 Cents. He also made two other statements, at the instance of the plaintiff's counsel; one, predicated upon the principle of charging the plaintiff with the full amount of the defendant's claim, allowing interest thereon, and deducting therefrom the payments as they were made, excluding the costs on the several judgments; which left a balance due the plaintiff of \$1109 91 Cents; the other, (somewhat variant,) giving the defendant credit for the amount of his claim, with interest calculated until the simple damages recovered by him exceeded the amount of principal and interest, and, thereafter, allowing the plaintiff interest on the amount of damages and costs from the return days of the subsequent executions, respectively; shewing a balance due the plaintiff of \$1109 68 Cents. At the request of the defendant, an account, sworn to by him, of the probable expenses he incurred in the prosecutions against the plaintiff, was also stated; amounting to \$1112 50 Cents.

The plaintiff being dead, the cause was revived in behalf of *William Robins* his executor.

On the final hearing, Chancellor TAYLOR dismissed the Bill with costs; from which decree an appeal was taken to this Court.

MARCH,
1820.

Tomkies'
executor
v.

Bowman.

After the cause had been argued by *Leigh* for the appellant and *Stanard* for the appellee, the COURT requested an argument *on these points*; 1st, whether the Act of Assembly authorised a motion for *more than one* fine for not returning the *same* execution; and 2d, if all the fines imposed in this case, after the first, were contrary to law, and might have been reversed on appeal, will a *common and general error*, as to this matter, authorise a Court of Equity to give relief;? and how far?

The argument upon these points, took place February 27th 1819, in the absence of the Reporter; but the subject appears to be fully discussed in the following opinions of the Judges, pronounced the 28th of March 1820.

Judge COALTER. In this case it appears that the appellee has received, in fines, more than his original debt and interest; after allowing him full compensation for all his trouble and extra expenses. He has also executions for farther sums; and the question is whether the Court of Equity has power to relieve against, what appears to me, such manifest oppression.

The Court, I believe, (at least a majority,) are of opinion that all the fines imposed, after the first, were illegal, and that if the point had been made, so as to present it to an appellate Court, every one of those judgments might have been reversed in a Court of law. The point, however, was not made, as we have reason to believe; for it was not even thought of when this Bill was filed, or when the case was first argued in this Court. In fact this point was suggested by this Court itself, and an argument directed upon it.

The amount of fines, since the first, exclusive of those sought to be enjoined, as well as I recollect, is about \$1500, or upwards, exclusive of costs. These have been imposed and collected clearly contrary to law. After the first fine, the party's remedy was to sue the Sheriff; and the measure of damages would have been the amount of the execution with interest, unless the Jury chose to add something by way of punishment on the officer, and as compensation to the plaintiff for extra

trouble; but surely it would have been wrong to have added to the original debt and interest, \$1500 or \$2000, (the amount of all the other fines,) by way of *smart money*. The Court of law could not have sanctioned such a verdict.

Mason,
1820.
Tomkies' executor
v.
Downman.

But the plaintiff in Equity has submitted to these fines; and as he was a public defaulter, it is said to be conscientious for the defendant to take *them*, and also those sought to be enjoined, and still to demand of him the original debt, because he had a remedy at law, and his *ignorance* thereof won't avail him here. I am not clear that this is a fair conclusion. Why did the party submit to the fines so repeatedly assessed upon him? Because he thought he had no redress. If those judgments were now in a state to be reversed, would it be unconscionable in the party, now asking redress in equity, to have them reversed? and would a Court of Equity interpose to prevent his recovering back the money? But they are not in that state; first, because, before this illegality is discovered, the time for a *supersedeas* has elapsed; and 2dly, because the point, not being thought of, may not have been made, and, consequently, the record may not shew, in any of the cases, that there had been a previous fine.

Shall this ignorance of law, universally prevailing till this moment, and in consequence of which this party has been deprived of his legal defence, be a sufficient excuse for him in this Court? and will not this ignorance, together with the loss of the execution as stated in the Bill, so far charge the conscience of the defendant, as that it shall be considered contrary to good conscience in him to put more into his pocket than his original debt and interest, (the first fine, which was lawfully imposed, and to which therefore he has as clear a right as to his original judgment,) and also all his extra costs? I think it ought. Agreeably to the Commissioner's report, it appears to me that all these extra costs are amply covered by the monies received; and that the Injunction ought to have been not only made perpetual as to the judgment sought to be enjoined, but that he ought to

MARCH,
1820.

Tomkies'
executor
v.
Downman.

be enjoined from any other or farther recovery on account of this transaction.

I think the authorities, to wit, the case of the Countess of Gainsborough v. Gifford, in 2 P. Wms. 425, Branch v. Burnley, 1 Call 147, and Bullock v. Goodall, 3 Call 44, and many other cases not necessary to be mentioned, justify this opinion. Indeed, under the last case, I should incline to interpose, even if the fines had been legally assessed, on the ground that they were far beyond the degree of the offence, and the injury to the party.

I should therefore be satisfied with a perpetuation of the Injunction, extending it to future actions as above; or I would agree to send the cause back to have an account taken, on the following principles, to wit; that the appellant here should be debited with the amount of the original execution against Ball, and interest thereon; with the first judgment for a fine, and interest thereon; and with all legal and extra costs and charges, incurred by the appellee in prosecuting those judgments; with directions to the commissioner to allow liberal extra costs; and have credit for all monies paid with interest on the coming in of which account, a decree should be made either for plaintiff or defendant, as the case might be. I consider that, if the appellant comes here to be relieved either because the fines are oppressive though legal, which is the case supposed in the Bill, or oppressive and illegal, as now turns out by the opinion of this Court on the law, yet he is a public defaulter coming into equity for relief, and, ought to put the opposite party in the situation he would have been in had the appellant done his duty. Had he paid up the amount of the execution after the first fine, and which the appellee was willing to receive, and had a right to receive, these extra costs, in the legal pursuit (as the party supposed,) of his just rights, would never have been incurred. These are not speculative damages, (a) but actual costs and charges incurred, and therefore can not be called monies put into the pocket of the appellee without consideration, though they came out of that of the appellant; and the former

(a) Halcomb v. Flournoy, 2 Call 438.

ought to be charged only what he actually put into his pocket clear of expense.

March,
1820.

Believing the accounts now to be pretty nearly square, according to these principles, I have no desire myself to send the cause back for a farther account.

Tomkies'
executor

Downman.

Judge CABELL. All the fines subsequent to the first were illegally imposed; for the Act of Assembly does not warrant more than one fine for failing to return an Execution. These fines illegally imposed, and actually paid by *Tomkies*, amount to more than double the principal, interest and costs of the Execution which he had failed to return. *Downman* having no right to extort these subsequent fines as a punishment on *Tomkies*, and having only a right of action against him for damages, the utmost measure of which would be the consolidated amount of principal, interests and costs on the execution not returned, together with interest on that consolidated amount it would seem just to compel him to apply the monies, he had illegally received from *Tomkies*, to the discharge of his legal demand against him. If this principle be correct, it must be eminently against conscience that *Downman*, after having already received from *Tomkies* the full amount of the only fine which the law authorised, and, after having received in addition thereto, under colour of illegal fines, double the amount of all the damages he had sustained or could legally have recovered, should still seek to oppress him by farther illegal fines.

This case bears a striking resemblance to that of *Bullock and Clough v. Goodall*, 3 Call 44. That, like this, was the case of a judgment for a fine against a Sheriff for having failed to return an execution. It was the first fine, and, in that respect, free from the legal objection arising from the repetition of the fine. But the real objection in that case, as well as in this, was that the fine was excessive, oppressive, and against conscience. It is worthy of particular attention that the bill, in that case, stated that the party had offered to prove to the Court of law, the circumstances on which he claimed relief in equity. And yet this Court granted the relief, and

Mason,
1820.
~~~~~  
Tomkies'  
executor  
v.  
Downman.

declared it would have done so, even if the defendant had pleaded to the jurisdiction or had demurred. I can perceive no substantial difference between the cases. It is true that, in this case, the fine was *illegal*, as well as against conscience; but I presume it acquires no additional sanctity on that account. Why then is not the party equally entitled to relief? If it be said that the matter, relied upon for relief in equity, was proper for the consideration of the Court of law, and that the party should have taken such steps, by excepting to the opinion of that Court, as would enable him to correct the error of the Court of law by appeal or *supersedeas*, the remark applies with equal force to *Bullock and Clough v. Goodall*. The omission to do so, proceeded, in both cases, from the mistake of the parties, in supposing that an exception to the opinion of the Court would be unavailing. Such an omission, in a case where the judgment of the Court is not only erroneous, but against conscience, shall not prevent a Court of Chancery from giving relief on equitable principles. But I am not disposed to go farther than to protect *Tomkies* from all future exactions, which is all that he himself asks. Although *Downman* has got from him more than his principal, interest and costs, yet he was compelled to receive it by piece meal, and to encounter much trouble and extra expense, for which the legal costs, recovered by him, afforded him no compensation. As it would be very difficult, upon any legal principle heretofore established, to settle the accounts between the parties so as to compensate *Downman* for the trouble and expenses forced upon him *Tomkies's* obstinacy, I think it better to decline the investigation altogether, and leave the parties as they now stand. I am therefore of opinion to reverse the decree of the Chancellor, and to reinstate and perpetuate the injunction, and, moreover to enjoin all future motions or actions at law founded on the failure to return the execution.

Judge BROOKE.—It will not be material to consider, in this case, what is the correct construction of the Act under which the fines were imposed on the plaintiff. Unless I entertained the opinion that he had in his bill laid

a foundation for the interposition of a Court of Equity, it would be superfluous; as this Court, when exercising its equitable jurisdiction, can not reverse a judgment for error at law. It is the peculiar province of a Court of Equity to relieve against penalties for the breach of contracts, but this is on the ground that it can place the parties in the situation, in which they ought to stand according to the justice of the case; and on the further ground, that it is against conscience to insist on a greater sum than the actual value of the contract.—6 Bro. parl. cases, 470, 12 Vesey jr. 202. In the case of a penalty inflicted by the law for some offence or delinquency, these grounds can not be relied on: a Court of Equity is incompetent to place the party and the commonwealth in the situation in which they stood before the offence was committed:—atonement to the public for the breach of a public duty, for the violation of a law, cannot be made. To relieve in such case, by remitting the fine or penalty, according to the theory and practice of our government belongs to another department. The power to pardon crimes, according to the common law and the practice of our government, includes also the power to remit fines and penalties. That power has always been exercised by the Executive, until, in the last particular, it was taken away by an act of the Legislature in conformity to the constitution. That the fines in the present case have been by the law given to the party injured, does not vary the principle:—it is not to be distinguished what portion of them is in compensation for the injury done him, and what in atonement for the failure to perform a public duty; and, if it were, the fines being transferred to him by the law, instead of being brought into the public Treasury, it is not against conscience to retain them. The first act on this subject gave only one half of the fine to the party injured. That fines ought to be assessed according to the injury to the party and to the public, is not denied; but that assessment is confided to the Court of law and not to this Court.

MARCH,  
1820.

Tomkies'  
executor  
v.  
Downman.

The object of the foregoing remarks is to show that Courts of Equity can not relieve against fines or pen-

MARCH,  
1820.  
Tomkies'  
executor  
v.  
Downman.

alties, inflicted by law, on the principles that they relieve in other cases. That Courts of Equity can interfere on the principle that the fines are excessive and in violation of the 9th Article of the Bill of rights, I think can not be insisted on. On that subject, the Court of law was as competent as this Court. But there are two grounds on which a Court of Equity can interfere in such cases: the one is, that the defence could not be made at law, because of the particular frame of the law itself; in that case, the party is relieved on the ground that, if his defence could have been made at law, the Court would not have adjudged against him: the other is the common ground of relief, either fraud, accident, mistake, or surprise, in consequence of which he failed to defend himself at law. The pretensions of the complainant, I think, can not be sustained on either of these grounds. His complaint is that he has been fined, by successive judgments in the Court of law, an amount greatly exceeding the sum due on the execution; and that the defendant will go on to move against him, unless he is relieved by the Court of Equity. He admits in his Bill that he adjusted a *part* of the debt, due the defendant on the execution, with the debtor *Ball*, and alledges the loss of the Execution, though he admits it to have come to the hands of his deputy, and relies for relief on the hardship of his case. It is in proof, I think, that he, in effect, received the whole amount of the execution from the debtor. He does not alledge an excuse for not defending himself at law. His case is not distinguishable, therefore, from a series of cases decided in this Court, in all of which it has been held that some adequate excuse must be alledged and proved, for the failure to make the defence at law. In the case of *Terrel v. Dick*, 1 *Call.* 546, the line which separates the two jurisdictions is plainly marked. In *Turpin v. Thomas*, 2 *H. & M.* 139, though Judge TUCKER was inclined, on the ground of hardship I presume, to make a distinction, the doctrine in *Terrel v. Dick* was recognised by the whole Court. The former case was really a hard one: the High Sheriff had suffered a judgment to be entered against him, under the impression that he had recourse

MARCH,  
1820.Tomkies' executor  
v.  
Dowman.

against his deputy, in which he was mistaken; that judgment also was not for a *fine*. In *Kincaid v. Cunningham*, 2 *Musf.* 1-10, the previous cases were reviewed, and relief refused. Soon after, in the case of *the Auditor v. Nicholas*, 2 *Musf.* 31, the same question occurred. In that case, there was some excuse offered for failing to perform a public duty; the want of a commissioner to certify the return; but it did not avail, because it might have been made in the general Court. As in *this*, in *that* case, also, the judgment was on a summary proceeding, and the penalty very enormous. That it was on a summary proceeding, made no difference; because, though Courts of law will see that the proceedings conform to the law, that circumstance furnishes no ground for the interposition of a Court of Equity. The circumstance, also, that in that case the law fixed the penalty, can not avail the plaintiff in this: the law has fixed the penalty, as soon as it is assessed by the Court to which the act has confided that power. The case of *Bullock v. Goodall*, 3 *Call* 44, is unlike the case now before the Court. In that case, relief was afforded on grounds that can not be relied on in this: it was alledged and proved that the creditor directed the Sheriff to hold up the execution. He had been guilty of no default within the spirit of the act, though there might have been some question whether he could defend himself at law. He stood on very different ground from that which the plaintiff in this case occupies; he had done nothing in violation of his duty: in this case the plaintiff converted the money of the defendant to his own use. In refusing to pay it when required, (as is proved,) and subjecting himself to repeated fines, he added contumacy to delinquency. He comes into Equity with a different face: if the case is a hard one, he has made it for himself; and, if he is to be received, contumacy and delinquency must be his passport; not, at least, an innocent omission to perform his duty. He violated the trust reposed in him by the law, most palpably.—When he insists that the execution was delivered to his deputy, (which is not proved,) to him it might have been confided, and, for all that appears, the creditor would

MARCH,  
1820.



Tomkies'  
executor  
v.

DOWNMAN.

have received his money. Under all the circumstances, the case of *Bullock v. Goodall* was decided prior to some of the cases referred to; and it is not now material to inquire whether it is not in conflict with them. The case of *Branch v. Burnley*, 1 Call 147, I think has as little application. *Branch* had subjected himself to no imputation of bad conduct; there is much reasoning on the point of jurisdiction, and the President finally relied on the absence of the creditor abroad, and the power of his Attorney to sue out an execution, as an excuse for paying the money to him instead of the former. The loss of the execution in this case, if proved, was no obstacle to payment of the money actually received by the plaintiff. As to the general delusion, (which is not hinted at in the bill,) he appears to have been influenced by a very different motive; he seems to have been satisfied to keep the money of the creditor, until the repeated fines amounted to much more, and then expects to set off one against the other: he even appealed from one of the judgments, to gain time. Before the Court can relieve him on the ground of delusion, it must reverse the judgments at law: the supposed delusion is in opposition to the judgments; and the moment the Court relieves on the ground of delusion, it reverses the judgments. On the ground taken, the judgments ought first to be reversed at law. If any analogy is relied on to the case of *Branch v. Burnley*, in the case of *Lyon v. Richmond*, in which this point comes in question, 2 *Johnson's New-York Chancery cases*, the Chancellor, I think very properly, says, "Courts of Equity do not relieve parties from their acts and deeds done on full knowledge of the fact, though under a mistake of the law: every man is to be charged, on his peril, with a knowledge of the law." There is no other principle which is safe and practicable in the common intercourse of mankind. To permit a subsequent Judicial decision in any one given case, in point of law, to open and annul every thing that has been done in other cases, of the like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace of Society,

no such previous precedent is to be found; there is yet no such precedent in this Court: if it now makes one, it will be new, and, at the same time, it will, in my opinion, confound the jurisdictions of a Court of law and Equity.—I am therefore for affirming the decree of the Chancellor.

MARCH,  
1820.

Tomkies'  
executor  
v.  
Downing.

Judge ROANE. This is a Bill praying to be relieved against repeated judgments obtained by the appellee against the appellant, formerly Sheriff of the County of Gloucester, for the default of one of his deputies in failing to return an execution. The judgments recovered, and the amount received thereupon, greatly exceed what was due upon the execution; and the appellee is therefore, already, in a much better situation than if the execution had been duly returned. The repetition of several judgments for the same offence, is not warranted by a sound construction of the Statute; and all the judgments except the first might have been reversed, upon an appeal, by a Court of law.—I infer this, because a second judgment can not be rendered for the *same* default, unless the Court departs from the express provision of the Act, in a highly penal and summary proceeding, by commencing the interest from the date of the first, (or immediately preceding,) judgment, (as is said to have been the practice,) instead of the return day of the execution; or unless you compute the interest again, (and *toties quoties*,) for the lapse of the *same* period of time. My construction is also fortified by the general principle which forbids a double punishment for the same offence. A contrary construction has however prevailed, and has governed not only the transactions of our citizens, but also the judgments of our inferior Courts. Of this we are, in some sense, officially informed by a note to the new Code of our Laws, Vol. 1. p. 542. It was this common error, or general delusion, perhaps, which both prevented the appellant from reversing the repeated judgments in a Court of law, and from assigning *this* as a ground of relief in the present bill. At the time of filing that bill, this construction had not been discovered to be erroneous. While a particular ignorance of the law forms no ground of relief in a Court of Equity, such a delusion



MARCH,  
1820.

Tomkies'  
executor  
v.  
Béwnnan.

as this is, may be relied on; and many cases to that effect might be cited.

Another ground of relief is the enormity of the fines in question, taken in relation to the sum due, and the injury actually sustained. This ground was taken by this Court in the case of *Bullock v. Goodall*, 3 Call 44; and an oppressive fine was relieved against in that case, as being forbidden by the principles of the bill of Rights.—It was also said, in that case, that the fine ought to be graduated, in the discretion of the Court, by the degree of the injury sustained.

I am therefore of opinion, that the present judgment ought not only to be perpetually enjoined; but the appellee should be decreed to refund all that he may have received under the several judgments, except the first; and saving to him also the principal and interest due upon the original execution. Every argument which goes to enjoin the *present* judgments, equally applies to all the judgments subsequent to the first; and, consequently, the appellee ought to refund all that he has received upon them. As to the claim of the appellee, of compensation for his trouble and loss of time, extra fees to Lawyers, the loss of a horse, &c.;—these, as well as all speculative losses and damages, must be thrown entirely out of our consideration. The just measure of relieving against fines or penalties, is that of the principal and interest actually due. The case, at least, must be strong and peculiar, in which this standard is to be exceeded.

This is my opinion in the present case. The decree ought, I think, to be reversed, and an account taken in order to a final decree conforming to these principles. While I agree with two of the Judges, that relief in this instance ought to be granted, I go beyond them as to the measure of that relief. In so doing, I, of course, concur with them, as to their measure, and unite with them in reversing the decree to the extent proposed by them. The decree drawn up by them, and to which I accede, as aforesaid, is in the following terms.

The Court is of opinion that the decree of the Chancery Court is erroneous; which therefore is reversed, with

costs; and, this Court proceeding &c., it is farther adjudged, ordered and decreed, that the Injunction be reinstated and made perpetual as to the judgments sought to be enjoined, and that the appellee be also perpetually enjoined from instituting or prosecuting any future suit or suits, for or on account of the failure of *Morgan Tomkies* to return the execution in the bill and proceedings mentioned.

MARCH,  
1820.

Tomkies'  
executor  
v.

Downman.

### Lane against Harrison.

Decided,  
March 28th  
1820.

THIS was an action of debt in the Superior Court of Fairfax County, brought in May 1811, by William Lane, late Sheriff, against *James Wigginton* late deputy Sheriff, and *James Hayes, Isham E. Hedges, James Purcell* and *William B. Harrison* his securities, upon a bond executed by the defendants to the plaintiff, on the 5th of April 1810, in the penal sum of forty five thousand dollars,

1. A judgment for the defendant, upon pleadings not going to the foundation of the action, is no bar to the plaintiff's bringing another

action for the same cause.

2. In debt on a bond with collateral condition, if the plaintiff, by replication to the plea of conditions performed, charge the breach *defectively*, but fully avoid, by other replications, such other pleas of the defendant as go to the foundation of the action; to which replications, demurrers are improperly filed; and the Court enter judgment for the defendant, *generally, upon all the pleadings*; such judgment is erroneous:—it should only be that the faulty replication is not sufficient in law &c., and therefore that the plaintiff take nothing &c.

3. In charging a breach of the condition of a Sheriff's bond, if it was alledged that he failed to return, to the office of the Clerk of the County, a forthcoming bond taken upon an execution from the Superior Court of law; such assignment of a breach was so defective that judgment for the plaintiff could not be rendered upon it in a case occurring before the 1st of January 1820. (But see R. Code of 1819, c. 128. § 103, 1st vol. p. 512.)

4. It seems, that where a high sheriff has given the bonds and taken the oaths required by law, when he originally qualified, and, before his first year of service expires, is continued in office for the second year by a Commission from the Executive and thereupon gives new bonds, it is not incumbent upon him to shew, in an action against his deputy, that he a second time took the oaths of office.

5. Where the High Sheriff is continued in office the second year, and takes a new bond of his deputy, (who is also continued,) for faithful performance of the duties of his office, it seems that, in an action upon such bond, the plaintiff is not bound to shew that the deputy took the oaths of office a second time, or that his appointment was approved by the County Court.

MARCH,  
1890.

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Lane  
v.  
Harrison.

with a condition that "whereas the said *William Lane* hath constituted and appointed the said *James Wigginton* his deputy Sheriff of the said County, in a certain portion thereof, (particularly described,) if therefore the said *James Wigginton* shall well and truly collect, account for and pay to the Treasurer of this Commonwealth for the time being, all taxes imposed by law in the County of Fairfax, and collectable in that portion of the County in which the said *James Wigginton* is to act as deputy Sheriff as aforesaid, and shall well and truly collect all levies, and account for and pay the same in such manner as is by law directed, and also all fines, forfeitures and amercements accruing or becoming due to the Commonwealth in that portion of the said County, &c., and shall duly account for and pay the same, &c., and shall well and truly collect and receive all officers' fees put into his hands to collect, and duly account for and pay the same, &c., and shall well and truly execute, and due return make, of all process and precepts to the Sheriff of Fairfax County directed, within that portion of the county, &c., and pay and satisfy all sums of money and tobacco, by him received by virtue of such process, to the person, or persons, to whom the same are due, his or their executors, administrators or assigns, and in all other things shall truly and faithfully execute and perform the said office and duties of deputy Sheriff of the said county, during the time of his continuance therein, then the above obligation to be void," &c.

The writ was returned not executed, as to all the defendants, except *William B. Harrison*; they not being residents of the County. The plaintiff thereupon filed a declaration against *Harrison* alone;—in the usual form of a declaration in debt on a plain bond, saying nothing of the condition.

The defendant, after praying over of the bond and condition, pleaded, 1st, "that he hath well and faithfully performed the condition of the said writing obligatory, and this he is ready to verify," &c.

Manca,  
1830.

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Lanc  
v.  
Harrison.

adly. After praying over a second time, he pleaded,  
“ that the plaintiff ought not to have and maintain his  
“ action against him, because the plaintiff, at the time  
“ of the execution of the said writing obligatory, that is  
“ to say, on the said fifth day of April 1810, had not duly  
“ qualified himself as High Sheriff of Fairfax County by  
“ taking the oath of office in such case prescribed by law,  
“ nor did he at any time thereafter take the said oath of  
“ office; and this the defendant is ready to verify, &c.

adly. He pleaded, “ that the plaintiff ought not &c.,  
“ because at the time of the execution of the said bond in  
“ the declaration mentioned, that is to say &c., the said  
“ James Wigginton, in the said obligation mentioned,  
“ was not qualified to act as deputy Sheriff of Fairfax  
“ County; that is to say, that the said James Wigginton  
“ had not, at that period aforesaid, taken any oath of  
“ office as deputy Sheriff under the said plaintiff as high  
“ Sheriff, nor was his appointment as deputy Sheriff  
“ aforesaid approved by the County Court of Fairfax,  
“ nor was he the said James, at any time thereafter, qual-  
“ ified, according to law as aforesaid, to act as deputy  
“ Sheriff of the county of Fairfax under the said plaintiff  
“ as high Sheriff aforesaid; and this the defendant is  
“ ready to verify,” &c.

To the first plea, the plaintiff replied, “ that, by any  
“ thing by the defendant in his first plea alledged, he  
“ ought not to be barred from having or maintaining his  
“ action aforesaid against him, because he says, that the  
“ defendant has not well and truly performed the condi-  
“ tion of the writing obligatory in the declaration men-  
“ tioned, in this, that one Ro. I. Taylor executor of John  
“ Watts deceased, on the 27th day of August in the year  
“ 1810, at the County aforesaid, sued out of the office  
“ of the Superior Court of law directed to be held for the  
“ said county, a certain writ of *capias ad satisfaciendum*  
“ against the body of one Sarah M'Carty, founded on a  
“ judgment in his favour, by the said Court theretofore  
“ rendered against the said Sarah M'Carty, for the sum  
“ of \$1260. 32 cents, with interest from the 22d day of  
“ January 1807 'till paid, and \$9. 32 cents costs; which

Manch,  
1820.

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Lane  
v.  
Marrioth.

" said Writ was delivered to one *James Wigginton* to be  
 " executed, to wit, on the       day of       , in the year  
 " 1810, at the County aforesaid; the said plaintiff being  
 " then and there Sheriff of the said county, the said *Wig-*  
 " *ginton* his deputy, and the defendant one of the secur-  
 " ties of the said *Wigginton* as deputy aforesaid; under  
 " which said Writ, the said *Wigginton*, having levied  
 " the same, took a certain bond commonly called a forth-  
 " coming bond, and made return upon said writ that  
 " he had executed the same and taken a forthcoming  
 " bond which had been forfeited; and the plaintiff avers  
 " that the said *James* did not return said bond to  
 " the office of the Clerk of said County within sixty  
 " days after the return day of the said execution;  
 " nor did the said *James* deliver the same to the said  
 " *Robert L. Taylor*, though thereunto required, to wit, on  
 " the       day of       in the year 1811, at the Coun-  
 " ty aforesaid; and this the plaintiff is ready to verify  
 " &c., wherefore he prays judgment, &c." To this Re-  
 " plication, the defendant rejoined, that the plaintiff  
 " ought not to have and maintain his action aforesaid  
 " by any thing alledged by him in his replication to the  
 " first plea of this defendant; because he saith that,  
 " after the execution of the said writing obligatory in  
 " the declaration mentioned, that is to say, at a Court  
 " held for the County of Fairfax at       Term in the  
 " year       , he the said plaintiff, as High Sheriff of  
 " the County of Fairfax, by the judgment of the said  
 " Court of Fairfax *did recover of this defendant* as one  
 " of the securities of the said *James Wigginton*, the sum  
 " of five hundred dollars, in consequence of the said  
 " *James Wigginton* not having returned to the office of  
 " the Clerk of the said County of Fairfax the forthcoming  
 " bond in the said replication mentioned, as by the rec-  
 " ords of the said Court is fully manifest and appears;  
 " and this the said defendant is ready to verify, &c."  
 " The plaintiff demurred generally to this rejoinder, and  
 " issue in law was joined.

To the second plea, the plaintiff replied, " ~~that~~ by  
 " any thing &c., he ought not to be barred &c., because

MARCH,  
1820.

Lane  
v  
Harrison.

“ he saith that, on the 13th day of July in the year  
“ 1808, he the said plaintiff was duly commissioned by  
“ the Governor of the Commonwealth of Virginia, to  
“ execute the office of Sheriff in the said County of Fair-  
“ fax; under which Commission he undertook to act,  
“ and, afterwards, before the Court held for the said  
“ County on the 19th day of September in the same  
“ year, gave the several bonds with security, and took  
“ the oaths of office prescribed by law for his qualifica-  
“ tion as Sheriff as aforesaid, under which appointment  
“ and qualification the plaintiff continued to act as  
“ Sheriff for one year after his said qualification, and was,  
“ with his own consent and the approbation of the Ex-  
“ ecutive, continued as Sheriff of the said County for two  
“ years after his said qualification; and, on being so  
“ continued, and before he entered on his second year, to  
“ wit, on the 20th day of March in the year 1810, at  
“ the County aforesaid, before the Court of the said  
“ County, the said plaintiff gave the several bonds with  
“ security, by law required, to qualify him to continue to  
“ act as Sheriff of the said County for the said second  
“ year, as by the Commission of the Governor under  
“ the seal of the Commonwealth, new to the Court here  
“ shewn, and the records of the County Court of Fair-  
“ fax in the said Court now remaining, will appear; all  
“ which the plaintiff is ready to verify; wherefore he  
“ prays judgment &c.”

The defendant demurred to this Replication; 1st, “ be-  
“ cause the said plaintiff does not in the said replication  
“ confess or deny whether the said plaintiff did, at the  
“ time of the execution of the writing obligatory in the  
“ declaration mentioned, or at any time thereafter, duly  
“ qualify himself, as High Sheriff of the said County of  
“ Fairfax, by taking the oath of office in such case made  
“ and provided by law; 2dly, because the said replica-  
“ tion does not answer the material allegation of the said  
“ plea; and 3dly, because the said replication is informal  
“ and insufficient.” Upon this demurrer the plaintiff  
joined issue.

March,  
1830.

~~~~~  
Lane
v
Marshall.

To the third plea, the plaintiff replied, "that, by any thing &c. he ought not to be barred &c., because he says, that, on the 13th day of July in the year , at the County aforesaid, he the said plaintiff was duly commissioned by the Governor of the Commonwealth of Virginia to execute the office of Sheriff in the said County of Fairfax; under which Commission he undertook to act; and, afterwards, at a Court held for the said County on the 19th day of September in the same year, before the said Court, he gave the several bonds with security, and took the oaths of office by law required, to qualify him to act as Sheriff as aforesaid; and after he had so qualified, to wit, on the 19th day of September in the same year, he appointed the said James Wigginton his deputy, who, on the same day, before the said Court, took the several oaths of office by law required to qualify him to act as Deputy as aforesaid; under which said Commission and qualification, the plaintiff continued to act as Sheriff of the said County for one year after his qualification, and was, with his own consent and the approbation of the Executive, continued for two years after his said qualification; and, on being so continued, and before he entered on his said second year, that is to say, on the 20th day of March in the year 1810, before the Court of the said County of Fairfax, he gave the several bonds by law required to qualify him to continue to act as Sheriff of the said County for the said second year; and, so continuing to act as Sheriff for the said second year, the said plaintiff continued the said James as his deputy for the said second year, who, thereupon, with the said defendant and others his securities, executed and delivered to the plaintiff the writing obligatory in the declaration mentioned; as by the Commissions of the Governor under the seal of the Commonwealth now here to the Court shown, and by the Records of the said County Court of Fairfax in the said Court now remaining, will appear; all which the plaintiff is ready to verify &c.; wherefore he prays judgment, &c." To this Replication the defendant

MAZON,
1820.

Lane
v.
Harrison.

“ demurred; “ 1st, because the said plaintiff does not
“ in his said replication confess or deny whether, at
“ the time of the execution of the said writing obliga-
“ tory in the declaration mentioned, to wit, on the
“ fifth day of October 1810, the said James Wigginton
“ in the said obligation mentioned was duly qualified to
“ act as deputy Sheriff of Fairfax County, by taking the
“ oath of office as deputy Sheriff for the second year;
“ 2dly. because the said Replication does not confess or
“ deny whether the appointment of the said James Wig-
“ ginton, as deputy Sheriff of the said County for the
“ second year, was approved by the County Court of Fair-
“ fax; and 3dly, because the said Replication is inform-
“ al and insufficient.” The plaintiff joined issue upon
this demurrer.

The matters of law presented by these pleadings being argued, were adjudged by the Court, in general terms, in favour of the defendant, and judgment was entered, that the plaintiff take nothing &c.; from which the plaintiff appealed.

Judge BROOKE pronounced the opinion of this Court, as follows:

The Court would affirm the judgment in this case, but for the objection that, being entered *generally*, upon *all* the pleadings, in favour of the appellee, it would be a bar to any future action on the bond declared on. The second and third pleas go to the *foundation* of the action of the appellant; but the matter alledged therein is fully avoided by the replications; and the demurrers to those replications ought, in the opinion of the Court, to have been overruled. The demurrer to the rejoinder to the replication to the first plea, ought also to have been overruled:—the rejoinder alleges no sufficient bar to the action of the appellant, had there been a *good replication*; but the rejoinder *mounts up to the replication*; and that is defective in this, that it alleges that the forthcoming bond, taken on the execution from the Superior Court, was not returned to the *office of the Clerk of the County*. The Judgment of the Superior Court ought therefore to have been restricted to the faulty Replica-

Mason,
1820:

—
Lane
v.
Harrison.

tion:—it is therefore reversed, and judgment is to be entered, according with this opinion, as follows:

The Judgment of the Superior Court of law is erroneous in this, that it decides the law, on *all* the pleadings, for the appellee, which would therefore be a bar to any future action by the appellant on the Bond in the declaration mentioned; when it ought to have been limited to the Replication of the appellant to the first plea of the appellee; the law arising on the demurrers, being for the appellant, had his Replication aforesaid set out a sufficient breach of the condition of the bond; but that Replication is bad in this, that it alleges, as a breach of the condition of said bond, the non-return of the delivery bond, in the said Replication mentioned, to the County Court office. The Judgment of the Superior Court is therefore reversed, with Costs, &c.; and, this Court proceeding &c., it appears to the Court that the Replication of the appellant to the appellee's first plea, and the matters therein contained, are not sufficient in law for the said appellant to have and maintain his said action against the appellee;—therefore it is considered by the Court that he take nothing &c.


Decided,
March 30th,
1820.

Lanier, Shelton and Cocke against Cocke, Crawford and Company.

1. After the Court of Appeals have passed upon a case, and remanded the cause for a new trial upon the general issue, a demurrer to the declaration, or a plea in abatement upon the ground that the christian names of the respective parties are not mentioned therein, ought not to be received. (See *Murdock and others v. Hernden's executors*, 4 H. & M. 200; *Scott & Co v. Dunlop, Pollock & Co*, 2 Manf. 349; and *Totty's executors v. Donald & Co*, 4 Manf. 430.

AFTER the decision by the Court of Appeals, in the case of *Shelton v. Cocke, Crawford & Co.*, reported in 3 Manf. 191—197, the cause being remanded to the Superior Court of law, *William Shelton*, the defendant upon whom the Writ had been served, tendered to that Court a demurrer to the declaration, 1st, because the christian and

surnames of the plaintiffs and defendants were not mentioned therein; which demurrer the Court would not permit to be filed; to which opinion the said defendant excepted. He also tendered a plea in abatement, setting forth the same defect in the declaration; and another plea alledging that the mercantile firm of *Cocke, Crawford & Co.*, included, among other persons, a certain *Thomas W. Cocke*, who was also a partner of the firm of *Lanier, Shelton and Cocke*. The Court refusing to receive the said pleas also, another bill of exceptions was filed.

MARCH,
1820.

Lanier, Shel-
ton and
Cocke
v.
Cocke,
Crawford
and Com-
pany.

The other points presented by the transcript of the record are unimportant. A new trial being had upon the issue formerly joined, a verdict was found for the plaintiffs, and judgment rendered accordingly; from which the defendants appealed.

BY THE COURT. The Court, not now deciding whether this suit was properly brought without inserting the Christian names of the respective parties, is of opinion that there is no other error in the proceedings; and that this objection, if it be one, comes too late, as this Court has already passed upon the case without noticing the objection aforesaid.

Judgment affirmed.

Smith against Smith's administrators.

Decided,
March 31st,
1820.

WILLIAM A. GREGORY and John Taliaferro administrators of *John Smith, jr.* deceased, brought detinue, for two slaves, against *Elizabeth H. Smith*, in the Superior Court of Spottsylvania County. A case was agreed by the parties, stating, that the slaves in the declaration mentioned were the property of *Jane Johnston* on the 2d

1. A deed of gift of slaves to a married woman, "to her own special use, and afterwards to her heir or heirs," with a clause providing that, "if she shall die without heir or heirs, or without a Will disposing of the said slaves and their increase, they shall return to the donor or his heirs," conveys the property to the separate use of the wife, so that, after the death of the husband, she is entitled to hold the slaves and their increase against his administrators.

MAZON,
1820.

Smith

Y.
Smith's
administra-
tors.

day of August 1807; and that she on that day conveyed them by Deed to *Elizabeth H. Smith* the defendant, then the wife of *John Smith* the plaintiff's intestate; which Deed was in the following words and figures:—"Know all men by these presents, that I *Jane Johnston* of the Town of Fredericksburg and State of Virginia, for and in consideration of my natural love and affection I have towards my daughter *Elizabeth H. Smith*, and for the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, hath given, granted and confirmed, and by these presents do give, grant and confirm unto the said *Elizabeth H. Smith* two negroes, *Lucy* and *Mary* her child, to have and to hold to her own special use, and afterwards to her heir or heirs. Nevertheless, if the said *Elizabeth H. Smith* should die without heir or heirs, or with a(1) Will disposing of the said *Lucy* and *Mary* with their increase, then and in that case, the said negroes *Lucy* and *Mary* with their increase to return to me or my heirs, as if this conveyance had never been made. In Witness whereof, I have hereunto set my hand and seal this 2d day of August 1807. JANE JOHNSTON." Teste, *Wm. Jackson, Edward Penn, Martha Lomax.*"

It was farther agreed, that the *fee simple* value of the said slaves was, \$350 for *Lucy* and \$250 for *Mary*; and that their value for the *life* of the defendant was \$120 for *Lucy*, and \$80 for *Mary*; that, if the plaintiffs were entitled to recover, they were entitled to \$60 damages for the detention of said slaves; that the intestate of the plaintiffs was in possession of them from the time of the conveyance aforesaid until his death, which happened in January 1815; that the defendant had been in possession of the same ever since the death of the said *John Smith*; and that the defendant had no issue.

The Court gave judgment for the plaintiffs, for the slaves, if to be had; if not, for their *fee simple value*; to which a Supersedeas was awarded by a Judge of this Court.

(1) Note. It is so in the transcript of the Record: the words, "*without a Will,*" seem to have been intended.

Stanard for the plaintiff in error. The plaintiffs in the Court below had no title to the property; inasmuch as the conveyance was to the *special use* of the defendant, and the slaves were to be subject to her disposal by Will. This gave her a *separate* property in them, exonerated from the marital rights of her husband; and, therefore, at his death, no right vested in his representatives. The doctrine, in cases of this nature, has been settled on liberal principles, to carry into effect the intention of the donor without regard to technical forms. (a) If the husband had any title, it was that of a mere trustee, with the beneficial interest to the separate use of the wife; and, as such trust arose from the necessity produced by the coverture, it ceased at his death, and was not transmissible to his *representatives*: and, even if it vested in them, it could not be set up against the *cestuy que trust*. (b)

This is not a question between a wife and *creditors*, but only between her and the administrators of her husband's estate. In the case of *Boyd and Swepson v. Stainbach and others*, 5 *Munf.* 305, it was decided that property conveyed to the wife's separate use is not *assets* in the hands of the husband's *administrator*, but only claimable by his *creditors*. If *creditors* were to sue in this case, it might be a question, (which is not now necessary to be decided,) whether they could take more than the *life interest* of Mrs. *Smith*, which alone could be vested in her husband by virtue of his marital rights.

Bouldin contra. It is manifest that, under the deed, Mrs. *Smith* took a *fee simple* estate, which therefore vested in her husband, as soon as he obtained possession of the slaves.

Mr. *Stanard* construes the words, "*special use*," in the same manner as *separate use*. The cases referred to by him, (as far as my Library enabled me to refer to them) are cases arising under *Wills*. I have found none where such loose and informal expressions have operated in *deeds*. The words "*special use*" might be intended to signify that the slaves were to be used as *house-servants*. In order to give a wife property, separately from

Manor,
1820.

Smith
v.
Smith's
administrators.

(a) 3 *Atk.*
393—399,
Darley v.
Darley, 5
Ves. jr. 517;
Ibid. 545; 9
Ves. jr. 369,
Rich v. Coch-
ran, *Prects.*
in Ch. 225; 1
Vezey sen.
303; 1 *Ves.*
jr. 46, *Fetti-*
place v. Got-
ges; 8 *Ves.*
jr. 589,
Roach v.
Haines.

(b) 1 *H.*
and *M.* 212,
Robinson v.
Brock.

March,
1820.

Smith
v.
Smith's
administrators.

her husband, a *separate use* must be *expressly* declared in the deed. In this deed there are *no trustees*, to intercept the marital rights of the husband. In *Robinson v. Brock*, there were trustees. The circumstance that trustees are not appointed, affords an argument to prove that a separate estate in the wife is not intended.

The separate estate of a wife is the creature of a Court of *Equity*: I have never known it set up in a Court of *Law*. If a Bill in Equity were resorted to, the Court could judge of all the circumstances, and consider whether the wife's claim ought to be sustained; or the property left in the hands of the administrators, which would be decreed if creditors were to be satisfied.

Stanard in reply. The Deed in this case was written by the donor herself, and ought to be construed with the same liberality as a Will. Her intention is manifest.— But all the cases are not of Wills. That of *Robinson v. Brock* was on a Deed; and there the Court did not permit the legal estate of the trustee to be interposed to prevent the *cestuy que trust* from recovering the property at law.

Judge ROANE delivered the Court's Opinion as follows:—

Upon the evident intention of the donor, in the deed in the proceedings mentioned, and on referring to the authorities, the Court is of opinion that the negroes in question were conveyed to the separate use of the appellant. The Judgment is therefore to be reversed, and entered for the appellant.

Smith against Pearce.

Decided,
April 1st,
1820.

FRANCIS SMITH sued out an attachment signed by an Alderman of the town of Petersburg, against *Samuel Pearce* as an absconding debtor, for the sum of \$312. 48 cents, due "by negotiable note, with interest thereon from the 1st day of February 1817." In the condition of the bond for prosecuting the attachment, it was said to be "for the sum of \$312. 48 cents;" without mentioning interest. On the second day of the court, to which the attachment was returned executed, *Alexander Cunningham*, a wealthy merchant of Petersburg, appeared in his proper person, and offered himself as special bail, to replevy the attached effects; but the Court refused to admit him to enter himself as bail, "because the said *Samuel Pearce* did not appear in his proper person or by Attorney, and it appeared, to the satisfaction of the Court, that he was still an absconding debtor." The plea of *nil debet* was also offered to be filed by *John Allison* as attorney for the said *Pearce*; which plea the Court refused to receive, "because the said *Pearce* did not appear when solemnly called; the plaintiff proved his note; the cause had progressed before the Court, some time, before bail was offered; and, when *Samuel Pearce* was called, the said Attorney was in Court, and did not appear for *Pearce*, but for *Alexander Cunningham*:"—to which opinion of the Court the said Attorney filed a Bill of Exceptions.

The Court entered judgment in favour of the plaintiff for the debt and interest claimed by the attachment; altho', in the negotiable note, (which was spread on the record by *oyer*,) interest was not mentioned. It bore date Dec. 19th, 1816, and was payable forty days after date.

Upon an appeal to the Superior Court of Prince George County, this judgment was reversed; and, that Court

leaving the plaintiff to appear in person or by attorney; such bail and plea being offered at the term to which the attachment is returned executed, and before the judgment upon it is pronounced.

1. If the claim of the plaintiff in an attachment against an absconding debtor, be stated as for a certain sum, due by negotiable note, with interest from the day when such note should have been paid; and the bond for prosecuting the attachment describe it as sued out for the sum of money mentioned therein; (saying nothing of interest;) the variance is not material.

2. Special bail to replevy the attached effects, and a plea to the action ought to be received, in behalf of the defendant upon an attachment issued against him as an absconding debtor; notwithstanding he did not (when so-

APRIL,
1820.

Smith
v.
Pearce.

proceeding &c., it was considered, that the warrant of attachment be quashed, "the same having irregularly issued, in this, that no bond correctly reciting the said attachment seemed to have been executed by the appellee;" that all the proceedings in the Hustings Court subsequent thereto be set aside; and that the appellant go thereof without day, &c.

To this Judgment, a Writ of *Supersedeas* was awarded by a Judge of the Court of Appeals; the grounds stated in the petition being, 1st, because there was no error in the inferior Court on the point stated in the Bill of Exceptions:—2d, because there was no substantial variance between the bond and the attachment, and, on a dissolution of the attachment upon the merits, an action would lie upon the bond; both of them stating a debt of \$312. 48 cents; and the only difference being that the plaintiff, in his attachment, demands *interest* on his debt, not because the note was *for interest*, but merely as a *consequence of the non-payment* of the debt:—the description of the attachment was therefore strictly correct:—the plaintiff did demand, as a *debt*, the *precise sum* stated in the bond:—his claim of *interest*, in the attachment, as a consequence of non-payment of the debt, was not necessary to identify the particular case to which the bond applied:—the description was *perfect so far as it went*; and it was not necessary to state in the bond that *interest also* was claimed.

Wickham for the plaintiff in error, submitted the case. No Counsel appeared on the other side.

Judge ROANE pronounced the Court's opinion, that the bond given on suing out the attachment in the proceedings mentioned, was not so imperfect as to justify the judgment quashing said attachment; and that the defendant should have been permitted to give special bail, and plead to issue, as he offered to do in the Hustings Court.

Both Judgments were therefore reversed; and it was ordered that the cause be remanded to the Superior Court, and from thence to the Hustings Court, with di-

rections to permit the defendant to give special bail, if the same shall be offered, and that the cause shall be proceeded in, to a final judgment.

Parker against Elliott.

Decided,
April 6th,
1820.

THIS was an action of Trespass on the case, in the Superior Court of Halifax County, brought by Philip Elliott against Daniel Parker, for debauching and getting with child Polly Elliott the plaintiff's "daughter and servant," whereby he lost her service for a long time, that is to say, for the space of nine months during her pregnancy, and one month thereafter, and was forced to expend divers sums of money, amounting in all to fifty dollars, in nursing and taking care of her, and in and about her delivery of her said child; to his damage two thousand dollars. The declaration was in the form laid down in 2 Chitty on Pleadings, p. 267, with no material difference. The defendant demurred; alledging, 1st, that the remedy of the plaintiff for the injury in the declaration alledged, ought to have been an action of Trespass *vi et armis*, and not on the case; 2dly, that the declaration contained no positive averment of any injury done by the defendant to the plaintiff. The Court, on argument, over-ruled the demurrer; whereupon a Jury was impanelled.

1. Trespass on the case may properly be brought by a father, for loss of the service of his daughter, and expenses incurred by him, in consequence of her being debauched and got with child; no forcible injury to himself or his property being alledged in the declaration. (See 3 Wils. 18; 2 Term Rep. 167; and 6 East, 387.

On the trial of the cause, the defendant moved the Court to instruct the Jury that, if they should consider, from the whole of the evidence, that the father, in the intercourse between the defendant and the plaintiff's daughter,

2. What is the proper form of the declaration in such case.

3. It is not error, that, in such case,

the Court refuse to instruct the Jury, that if, upon the whole evidence, it shall appear to them, that the father, in the intercourse between the defendant and his daughter, (who was of full age,) did not act with the caution of a man of ordinary prudence, they ought to find for the defendant; but do instruct the Jury that, if the conduct of the plaintiff shall appear to have been indiscrete, that is a circumstance which should mitigate the damages.

April,
1820.

Parker
v.
Elliott.

ter *Polly Elliott*, (who was of full age,) did not act with the caution of a man of ordinary prudence, in that case they should find *for the defendant*; which instruction was refused by the Court:—but the Court did instruct the Jury that, if the conduct of the plaintiff should appear to have been *indiscrete* that was a circumstance which should *mitigate the damages*. To this opinion the defendant excepted. A verdict was found for the plaintiff, assessing his damages to \$609, besides his costs.

The defendant moved for a new trial, which the Court refused to grant; (the plaintiff by his Counsel releasing \$209, part of the said damages;) and judgment was entered according to the verdict, deducting the sum released.

The defendant obtained a Writ of *Supersedeas* from a Judge of this Court.

Bouldin for the plaintiff in error, relied on two objections; 1st that the declaration was all *recital*; beginning with the words “for that *whereas*,” and so continuing to the end, without any positive averment; and, 2d, that trespass *vi et armis*, and not *case*, should have been the action; to prove which he cited *Woodward v. Walton*, 5 *Bos. & Pull.* 476.

Leigh contra. The declaration is copied from 2 *Chitty*, 267. It is there said, in note (u), that *case* seems the more proper form, when the action is *merely* for the seduction and loss of service; and so says Judge BULLER in *Bennet v. Allcott*, 2 *Term Rep.* 167, which opinion is supported by the reason and nature of the thing; the injury being only *consequential*, and *not accompanied with force*. The declaration, it is true, *may* be in Trespass *vi et armis*, but this is founded on a fiction of law, which *supposes force* in such cases; but, in fact, there is no force at all; at any rate, none to the *father* or *his* property: as to *him*, the damages are all consequential.

(a) 2 *Chitty*
265. note
(r), citing 2
Salk 636; 1
*Str*a 621.
(b) See
ante p. 219:

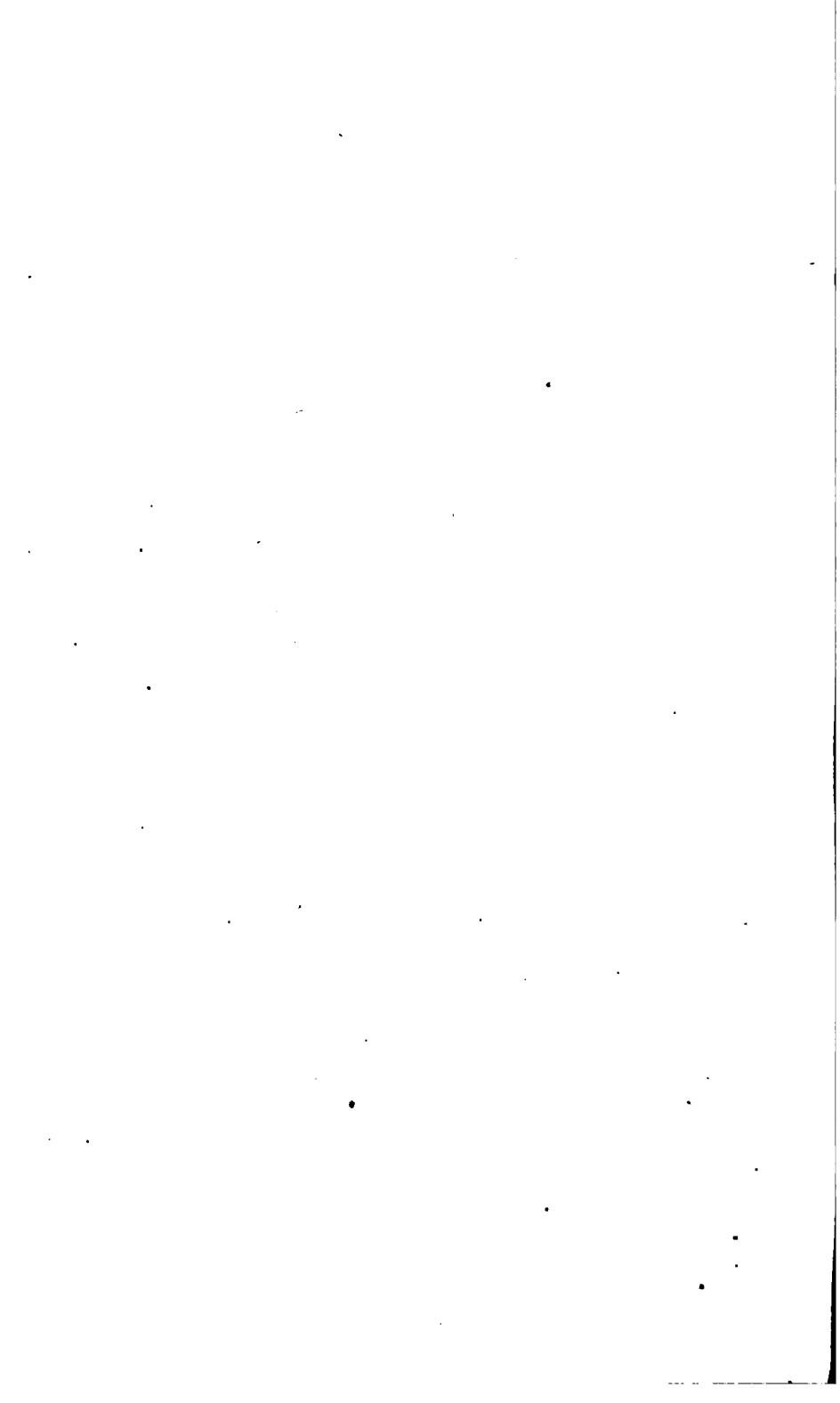
As to the *quod cum*, *Chitty* says it is proper in such a case as *this*, though improper in *trespass*. (a) In *Pate v. Bacon & Co.*, decided by this Court at last term, (b) the declaration was like that now in question; yet the judgment for the plaintiffs was affirmed.

Bouldin in reply, submitted the question of the *quod cum* upon the authorities, which are very familiar. Mr. *Leigh* (he remarked) had produced no *authority* to prove that *case* was the proper action, but only Mr. *Chitty's* opinion, and a mere *dictum* of Judge *BULLER*, not supported by any authority. The case in *Bosanquet and Fuller* was on the very point now before the Court, and decided on full deliberation.

BY THE COURT, the Judgment was affirmed.

APRIL,
1820.

Parker
v.
Elliott.



AN INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A.

ACCIDENTS.

1. It is not a sufficient ground for a bill of review, that certain documents, on which the complainant's right to a decree depended, and which he intended to exhibit with his original bill, were *lost or mislaid by his Counsel*, and not found until after the decree against him. *Jones v. Pilcher's devisees*, p. 425-427.

ACCOUNTS.

1. A settlement of an Executor's administration account, certified by commissioners on a day subsequent to his death, and not appearing to have been made in his lifetime with notice to himself, nor, after his death, with notice to his executor, is erroneous, and ought not to be received as the ground of a decree against his estate. *Boyd ex'or of Hoskins v. Kaufmans*, p. 45-47.

ACTIONS.

1. After a judgment in detinue, a new action of detinue against the same de-

fendant for the same thing, in which the former judgment is not declared upon, but is only relied on as evidence of title, can not be maintained. *Withers's ex'or v. Withers's ex'or*, p. 10-12.

2. *Quære*, whether any action, other than a *scire facias*, can be maintained upon a judgment in Detinue?—*Ibid*.

3. Actions may be brought in the Courts of *this State*, upon contracts entered into, or personal injuries committed, *any where*. In general, it is not necessary to state in the declaration where the contract arose, or the injury was committed;—but this is sometimes necessary; and, then, (for the sake of obviating the objection of a variance, or the like,) the plaintiff is permitted to state, by a fiction, under a *videlicet*, that the place is within the jurisdiction of the Court in which the suit is brought; which fiction, being in furtherance of justice, can not be traversed. *Shaver v. White & Dougherty*, p. 110-114.

4. *It seems*, that if a judgment be rendered, in a Federal Court, against the executors of a *surety*, and they pay the money, they cannot recover it against a *devisee* of the principal debtor, by *motion*, or any action at *Common law*,

in the General Court, or any other Court of law of this Commonwealth. *Cubell's ex'or v. Megginson's adm'r's* p. 202-207

5. An action of debt may be brought upon a three months replevy bond for rent, though it gave back-interest from the time when the rent became due, and not merely from the date of the bond; which circumstance, the Court were inclined to think, makes it not a good bond under the Statute. *Early v. Owen*, p. 319-320.

6. A special action on the case lies against the surveyor of a County for fraudulently refusing to furnish copies of surveys when lawfully demanded, and thereby enabling a third person to locate the lands, therein described, before the plaintiff. *Preston v. Bowen*, p. 271-277.

7. See ASSIGNMENTS; *Johnston v. Hackley*, p. 448-450.

8. A judgment for the defendant, upon pleadings not going to the foundation of the action, is no bar to the plaintiff's bringing another action for the same cause. *Lane v. Harrison*, p. 575-580.

9. Trespass on the case may properly be brought by a father, for loss of the service of his daughter and expences incurred by him in consequence of her being debauched and got with child;—no forcible injury to himself or his property being alleged in the declaration.—*Parker v. Elliott*, p. 587-589.

ACTS OF ASSEMBLY.

1. The 2d section of the Act of 1792 concerning slaves, extends only to slaves brought into this Commonwealth by the absolute owner of them, and not to such as are brought in by wrong-doers, or by persons having only a limited interest in them. *South v. Solomon and others*, p. 12-13.

2. The Court will not give such a construction to the general words of an Act as would subject the property of innocent individuals to loss by the acts of third persons; nor such as would favour a partial emancipation during the interest of a particular tenant of slaves. *Ibid.*

ADMINISTRATION.

1. Where the personal property of the wife is so settled, by a Deed executed before the marriage, and duly recorded, that, upon her dying intestate in her husband's lifetime, the trustee is

to convey the same to her legal heirs; her nearest blood relation is, in such event entitled to the administration of her estate, in preference to her husband. *Bray v. Dudgeon*, p. 132-133.

2. See SHERIFFS; *Thompson's adm'r v. Thompson's ex'or*, p. 514-519.

AFFIDAVITS.

1. A motion for a new trial, on the ground that the verdict is contrary to evidence, ought to rest on the evidence actually given in at the trial, exclusive of all other:—especially, affidavits taken ex parte, ought not to be heard on such motion. *Street v. St. Clair*, p. 457-458.

2. The affidavit to the plea of non est factum, is not rendered defective by inserting the words, "to the best of the defendant's knowledge and belief." *Jackson v. Webster*, p. 462-464.

3. No man can be required to swear positively, (if at all,) to legal inferences. *Ibid.*

AGREEMENTS.

1. A parol agreement, between husband and wife, that, in consideration of her joining him in a conveyance of a parcel of her lands, he would purchase certain other lands, build thereon, and convey the same to her, being clearly proved, and partly executed, by her joining in the deed, and his making the purchase and erecting the buildings, ought to be enforced in equity against his heirs; notwithstanding a great disparity in value between the lands so bought and sold; it appearing that, at the time of the marriage, the husband was very poor, and that all the real property in his possession, (except the land purchased as aforesaid,) was held in right of the Wife. *Gooden and Wife v. Tucker's heirs*, p. 1-3.

2. A contract under seal, for valuable consideration, ought not to be avoided on the ground that a party was intoxicated at the time, if his assent was afterwards given, when not disabled by intoxication or otherwise. *Arnold v. Chapman*, p. 15-18.

3. It seems, that intoxication is not a sufficient ground for vacating a party's assent to a contract, unless he was so drunk as to be incapable of business. *Ibid.*

4. A shipper of corn having agreed to deliver it, on board, with no unreasonable delay; the Captain of the vessel

applied for it on *Sunday*, and, no person being ready to deliver it, would not wait 'till Monday, but went to sea without it. The ship owner was not entitled to *dead freight* on the quantity not shipped; but, on the contrary, was bound to make compensation to the other party, for the loss sustained, in consequence of the Captain's not taking the full quantity on board. *Dunbar v. Buck*, p. 34-36.

5. A widow, (being entitled, under the Will of her husband, to make a crop on his home plantation in conjunction with one of his sons, and to a sufficiency of corn and *pork*, with necessary working utensils, for her support and that of her family, the first year, on a plantation directed to be purchased for her,) agreed to give up, to two of the persons named as executors, (one of whom only, with a third person, administered,) her part of the crop, then growing, upon condition that they should purchase as much *corn* and *provisions*, in the ensuing winter, as herself and a friend of her's should judge sufficient, to settle her on the said plantation; which was accordingly done. This was held a binding compromise of her right to the share of the crop. *Daniel and Wife v. Macline*, p. 61-64.

6. A person disposed to purchase a tract of land, wrote to the owner, enquiring whether it was for sale, and what were his terms by the acre: stating also the payments it would be convenient for him to make; one of which was \$1000 *immediately*:—the answer to this letter, stated the price the owner was willing to take, but that he wished the purchaser to take upon himself the responsibility of establishing the lines of the tract;—he also *acceded* to the offered terms of payment, and required the purchaser's answer as soon as possible, in case he was disposed to *accede* to these terms; the purchaser's reply stated, that he would *take the land* on the terms proposed, and would have the lines ascertained; though it went on to express his wish that the owner's agent should attend to the settlement of a part of the boundaries, through motives of delicacy in relation to one of the co-terminous tenants; saying nothing, however, of waiving or abandoning his acceptance of the terms proposed. This amounted to a complete and concluded contract for a sale and purchase of the land. *Fitzhugh and Grinnan v. Jones*, p. 83-87.

7. The word *immediately*, used on this occasion, only meant that the payment should be *prompt* in contradistinction to a *credit* payment. A tender of the money, therefore, without any unreasonable delay, was sufficient. *Ibid*.

8. An agreement for the sale of land being, that the vendor shall make and execute deeds of conveyance, and the vendee shall pay, *on the day of the execution of the said deeds*, part of the purchase money, and give bonds for the balance, as soon as the quantity, (supposed to be a certain number of acres,) can be ascertained by an accurate survey; the vendee is not bound to make the said payment, nor give bonds for the balance, until the vendor shall first have made or tendered the *conveyance*; notwithstanding a survey ascertaining the quantity of the land has been made.—*Spindle's adm'r v. Miller's ex'ors* p. 170-173.

9. If the terms of the agreement be, that the Vendor binds *himself* to make the conveyance, and the vendee binds *himself and his heirs* to make the payment &c., *on the day of the execution of the conveyance*; and no conveyance be made or tendered by the Vendor in his lifetime; the Vendee is not bound to accept a conveyance from his *heirs*, but may waive the contract altogether. *Ibid*.

10. Though a purchaser of a tract of land agree to pay so much *by the acre*, yet if he also agree to take it *by the patent, or survey* already made, as *fixing* the number of acres in the tract, (without any fraud, concealment, or misrepresentation, on the part of the vendor,) he thereby takes upon himself the risk as to quantity; by which he might be gainer or loser; and therefore is not entitled to any compensation for a deficiency. *Fleet v. Hawkins*, p. 188 191.

11. If parties negotiating for the sale of a tract of land, agree, in writing, upon a specified price per acre; but that the vendor shall take, in payment, a house and lot of the vendee, *at cash value, to be pronounced by two persons, (not naming them;)* or *the money* by certain instalments, *in case the vendee shall prefer paying money*; and afterwards, (the vendee not having elected to pay money for the land,) the parties, by endorsement on the writing, appoint two persons to value the house and lot, who attempt to do so, but differ in opinion; whereupon they verbally agree to make another appointment, at some other time *not specified*:—the contract is too in-

complete to be enforced by a Court of Equity. *Baker v. Glass*, p. 212-218.

12. The land of *H.* being about to be sold for debt at public auction for ready money, it was agreed between him and *J.* that *J.* should bid to the amount of the debt; and that if the land should thereupon be struck off to him, he should re-sell it to *H.*, for a sum thereafter to be agreed on; provided the same should be paid within twelve months. The land was, accordingly, struck off and conveyed to *J.*, for much less than its cash value. *H.* died before the end of the twelve months, without having agreed on the sum to be paid for repurchasing the land. Upon a bill in Equity exhibited by his representatives, it was decided, that the contract should be rescinded, on making just compensation; the measure of which was, the sum paid by *J.* for the land, with lawful interest. *Jones v. Hubbard's representatives*, p. 261-264.

13. In the year 1775, *I. Z.* made a settlement on the upper part of an Island in the Ohio River, containing in all 285 acres. In 1777, his brother *E. Z.* made a settlement on the lower part. A parol agreement between them, in or before the year 1784, that *E. Z.* should exhibit his settlement right, to the land commissioners, obtain their certificate, and get a Patent to himself for the whole Island, and afterwards convey to *I. Z.* in fee simple his part thereof, situate above line trees, was enforced in Equity, upon a bill filed in 1815, by *I. Z.* whose possession of the land had continued without interruption from the time of his first settlement. *Zane's devisees v. Zane*, p. 406-417.

14. See CONSIDERATION; *Rid.*

15. See EQUITY; *Ibid.*

16. See USURY; *Pollard v. Baylors & others*, p. 433-439.

17. Notwithstanding a clause of general warranty in a deed for land, a Court of Equity will receive parol testimony to prove that such clause was contrary to the actual agreement, by which the land was to have been conveyed with special warranty only; the written agreement of the vendor to make the conveyance, not being produced on the part of the vendee, to whom it was delivered. *Bumgardner & others v. Allen*, p. 439-447.

18. See MORTGAGES; *Ibid.*

19. An agreement between a vendee and a derivative purchaser, that such purchaser shall pay the debt of the vendee to the vendor, for the land, must be

understood as subject to the same limitations and exceptions, as if the contract had been to pay the money to the vendee himself. *Ibid.*

20. See ASSUMPT; *Woody v. Flournoy*, p. 506-510.

21. See DEEDS; *Prior & others v. Kinney's ex'ors*, p. 510-514.

ALIENS.

1. A sale and conveyance of land by a trustee, can not be set aside on the ground that he was an alien when the deed was made to him, and when he conveyed the land to the purchasers. *Ferguson v. Franklins*, p. 305-306.

AMENDMENTS.

1. In this case, the Sheriff was permitted by the Court to amend his return, after a lapse of seven years from its date. *Rucker v. Harrison*, p. 181-184.

ANNUITIES.

1. A decree against purchasers of a tract of land, incumbered by a mortgage to secure the payment of an annuity, ought to provide that so much of their lands, respectively, be sold, as will be sufficient to pay their proportions of the sum remaining due and unsatisfied by a sale of so much of the tract as was retained by the vendor, and liable to be sold; except so far as they shall pay their respective proportions of such debt, and agree to hold their lands subject to the future decree of the Court for their proportions of any sums growing due to the plaintiff thereafter. *Mayo v. Tomkies*, p. 520-528.

ANSWERS IN CHANCERY.

1. See EQUITY; *Zane's devisees v. Zane*, p. 406-417.

2. See USURY; *Greenhow's adm'r v. Harris*, p. 472-484.

APPEALS.

1. If a Judgment of a County Court be assigned, and afterwards reversed by the Superior Court of law, the assignee may thereupon sue the assignor, without carrying the case to the Court of Appeals. *Arnold v. Hickman*, p. 15-18.

2. Damages ought not to be given upon the affirmance of a decree in

missing a bill with costs; such decree not being rendered, "for any sum of money or quantity of tobacco," except the costs. *Williamson & others v. Bemis & others*, p. 176-180.

3. Upon a judgment in Ejectment, if execution of the writ of *habere facias possessionem* be prevented, for several years, by injunction, the plaintiff is entitled to the Writ, on motion, upon a rule to shew cause, without a *scire facias*; provided not more than a year has elapsed since the affirmance, by the Court of Appeals, of the decree dissolving the injunction and dismissing the bill in Chancery. *Noland v. Seckight loose of Cromwell*, p. 185-187.

4. *Quere*, whether an Appeal can not be taken *as of right*, from a decree which is final as to one of the defendants, whose claim is adverse to that of the plaintiffs and all the other defendants, as to whom the cause is continued in Court? *Alexander's heirs v. Coleman & wife*, p. 328-352.

5. Where an appeal is taken in Court, the appeal bond cannot legally be given in the Clerk's office. *Thomson & O'Neal v. Evans*, p. 397.

6. The Superior Courts of law have jurisdiction to grant Writs of *Superedeas* to orders of the County or Corporation Courts binding persons, accused of being the fathers of bastard children, to support such children; and the Court of appeals, in like manner, has jurisdiction to correct errors in the decisions of the Superior Courts of law on the same subject. *Mann v. the Commonwealth*, p. 452-453.

7. The Circumstance that the amount of the usurious gain was less than one hundred and fifty dollars, and that relief ought to be given to that extent only, was not considered, on an appeal from a Superior Court of Chancery, as furnishing a valid objection to the jurisdiction of the Court of appeals; the subject in controversy upon the appeal being the whole debt and interest, which amounted to more than one hundred and fifty dollars. *Stone v. Ware & Smith*, p. 541-550.

8. After the Court of Appeals have passed upon a case, and remanded the cause for a new trial upon the general issue, a plea in abatement or demurrer to the declaration, upon the ground that the Christian names of the respective parties are not mentioned therein, ought not to be received. *Lanier & others v. Coche, Crawford & Company*, p. 580-581.

ASSAULT AND BATTERY.

An action for an assault and battery committed upon an infant, ought not to be brought in the name of the guardian of such infant, but in the name of such infant by his or her guardian or next friend; and error in this respect, before January 1st 1820, was fatal, even after general verdict for the plaintiff. *Stewart v. Crabbin's guardian*, p. 280.

ASSETS.

1. It seems, that, where a decree against executors, for a legacy, is made upon their confessing assets, in their hands, sufficient to satisfy the same, without specifying whether such assets consist of money or other property; such decree may with propriety direct that they pay the legacy and interest, with the costs of the suit, out of the said assets, if so much thereof they have; if not, out of their own estates. *McRae's ex'ors v. Brooks & wife*, p. 157-159.

2. See EMBLEMENTS; *Thompson's administrator v. Thompson's ex'or*, p. 514-519.

ASSIGNMENTS.

1. If a judgment of a County Court be assigned, and afterwards reversed by the Superior Court of law, the assignee may thereupon sue the assignor, without carrying the case to the Court of Appeals. *Arnold v. Hickman*, p. 15-18.

2. *Assumpsit* may be brought against the assignor of a judgment, afterwards reversed; notwithstanding the assignment was by a sealed instrument; for, in such case, the sealed instrument is not the ground of the action, but only inducement thereto. *Ibid*.

3. The right of the assignee of a bond to demand payment thereof in a Court of Equity, which existed before the Statute authorising him to sue at law in his own name upon the assignment, is not impaired by that Statute; but the latter remedy is cumulative and additional to the former. *Winn v. Bowles*, p. 23-25.

4. The assignor and assignee of a bond being made defendants to a bill exhibited by the obligor, for an Injunction and for general relief; he alledging that he paid the money to the assignor without notice of the assignment; if that allegation be afterwards disproved, whereupon

the Injunction is dissolved, and the Bill dismissed as to the assignee; the cause ought yet to be retained and farther proceeded in, to give the complainant relief against the assignor. *Ruffner v. Barrett*, p. 207-209.

5. The assignee of a bond can not recover against the assignor, upon a declaration stating that the plaintiff brought suit and obtained a judgment, which was enjoined, upon a bill claiming equitable discounts on account of certain dealings and transactions between the obligor and the assignor before the assignment, and that the plaintiff was thereby entirely deburred from collecting the debt; without stating that the Injunction was made perpetual, or what proceedings took place thereon. *McChung v. Arbuckle*, p. 315-316.

6. The right of a bona fide assignee, for valuable consideration, of a note negotiable at the Bank of Virginia, to recover against the maker and endorsers of such note, is not to be affected by any equity of which he had no notice when he received it. *McNeil and Turner v. Baird*, p. 316-318.

7. If the maker of a note negotiable at the Bank of Virginia, file a Bill of Injunction against the payee and his assignee, on the ground of an Equity affecting the payee only, the Court of Chancery, having before it all the parties concerned, ought not to discharge the maker altogether, nor to turn over the assignee to a suit at law against the payee, but should decree against the latter, in the first instance, that he pay the amount of the note to the assignee, and the costs at law; and liberty should be reserved to the assignee to apply to the Court to dissolve the injunction as to the maker, for so much of the said debt as he may not be able to recover from the payee; in which case a decree ought also to be rendered in favour of the maker against the said payee, for so much thereof as he may be compelled to pay as aforesaid. And the decree should farther direct, that the action at law in favour of the assignee against the payee, if any be pending, be perpetually enjoined, except as to the costs. *Ibid.*

8. In such case, the payee should pay to both the other parties, their Costs in Chancery, and in the Court of Appeals, upon an appeal taken by himself and the assignee, in the decision of which, both the other parties substantially prevail. *Ibid.*

9. In an action by the assignee against the assignor of a bond, the point in dispute being whether the assignee has used due diligence in suing the obligor; if the plaintiff produce a transcript of the proceedings in a suit which he brought against the obligor, shewing the time when the declaration was filed, but not the date of the Writ; and the defendant demur to the evidence, the Court not interfering nor requiring a Copy of the Writ to be produced; such demurrer should be set aside, and a venire de novo awarded. *Taliaferro v. Gatewood*, p. 320-328.

10. It is generally necessary for the assignee of a promissory note to sue the drawer, in order to charge the indorser: but to this rule there are exceptions, where the plaintiff can shew a discharge of the drawer under the former bankrupt laws of the United States, or the insolvent law of this State, or that the drawer was actually insolvent, so that a suit would have been wholly unavailing. *Brown v. Ross*, p. 391-393.

11. In a suit by the assignee against the assignor of a bond, if it appear that, after judgment against the obligor, a fieri facias was returned nulla bona; and that, afterwards, the assignee sued out a capias ad satisfaciendum, upon which the return was, "executed on the body of the defendant, who stands committed to the prison bounds, as per bond &c.," the plaintiff can not recover, but must be considered as having brought his action prematurely; because, for aught that appears in the record, the obligor is still in custody under the ca. sa., or may have paid the debt. *Johnston v. Hackley*, p. 448-450.

ASSUMPSIT.

1. A guardian may bring *assumpsit*, in his own name, upon a draft or order payable to himself as guardian, for money due to his ward. *Jelliffe v. Higgins*, p. 3-6.

2. *Assumpsit* may be brought against the assignor of a Judgment, afterwards reversed; notwithstanding the assignment was by a sealed instrument; for, in such case, the sealed instrument is not the ground of the action, but only inducement thereto. *Arnold v. Hickman*, p. 15-18.

3. If a militia man employ and pay a substitute to perform his tour of duty, and thereupon be discharged by the com-

sounding officer, he can not recover back the money paid, upon the ground that the defendant, after repairing to the place of rendezvous, and commencing the march, was discharged as a supernumerary, and therefore never performed the tour of duty. *Keys v. McFarbridge*, p. 18-30.

4. A plaintiff in *assumpsit* is entitled to recover upon a *parol* agreement of the defendant, that, if the plaintiff would furnish and supply a certain married woman and her infant children, with board, washing and lodging for a certain time, he the defendant would pay him for it; averring and proving, that he furnished the board, washing and lodging, accordingly: and this, although the woman's husband be in the Commonwealth at the time and bound to furnish her and the children with necessities; and the defendant be not morally nor legally bound, but by his said promise. *Lunier v. Hurwell*, p. 79-81.

5. In *assumpsit*, the testimony of witnesses, offered to prove the items in the plaintiff's account, ought not to be excluded from the Jury upon the ground that, in an action of debt between the same parties, (the record of which action is not exhibited,) determined during the pendency of the action of *assumpsit*, one of those witnesses was examined touching the same items claimed by the plaintiff, to repel or set-off the credits then claimed by the defendant. *Robertson v. Depriest*, p. 469-470.

6. In *assumpsit* upon a written agreement, an express promise ought to be laid in the declaration: a mere recital of the writing, though a true copy, is not sufficient. *Woody v. Flournoy*, p. 506-510.

7. The declaration was upon a general *indebitatus assumpsit*, for the hire of five slaves, for which the defendants, being co-partners, promised, on the 1st of January 1811, to pay the plaintiff the sum of \$350, when they should be thereunto afterwards required:—the plaintiff could not recover upon a writing signed by one of the defendants, certifying that he had hired of the plaintiff five slaves at the price of \$350, and that this should entitle the plaintiff to the other defendant's bond for the same, payable on the 1st of January 1811. *Id.*

ATTACHMENTS.

1. Case for malicious prosecution, and not trespass *vi et armis* is the proper ac-

tion against a person who, maliciously and without probable cause, sues out an attachment, and causes it to be levied on the property of another. *Shaver v. White & Dougherty*, p. 110-114.

2. It seems, that, upon an attachment for a debt claimed as due from one co-partner, the Sheriff must seize all the partnership effects, and sell a moiety thereof undivided; in which case, the vendee will be tenant in common with the other partner: for, if he seized but a moiety, and sold that, the other partner would have a right to a moiety of such moiety. *Ibid.*

3. Agreeably to the practice in this state, a Subpoena in Chancery with an endorsement thereon, "to stop the effects and debts of the absent defendants within the State," (mentioning their names,) "to satisfy a debt due from the absent defendants to the plaintiff," operates, from the time of the service of that process on the defendants within the State, as an attachment to stop the payment by them of monies due from them to the absent defendants, and to inhibit a transfer thereof from the said absent defendants to other persons. *Williamson & others v. Bowie*, 176-180.

4. An Attachment in Chancery lies to secure a debt payable at a subsequent day, or to relieve the endorser of a note which has not become payable at the date of such attachment, which binds the property in the hands of the garnishee, from the time of its service, so as to inhibit the absent defendant's making a transfer thereof, even for the benefit of a creditor whose claim is already due and payable. *Ibid.*

5. A creditor residing in Maryland, may sue out an attachment in Chancery in Virginia, against his debtor, residing also in Maryland, and others residing in Virginia, indebted to, or having in their hands effects of, such debtor. *Ibid.*

6. In a suit against a Constable for breach of duty in not delivering to the Sheriff, in obedience to the Court's order, attached effects in his hands, testimony on his part to prove that any of those effects were not the property of the person against whom the attachment issued, and therefore, after being taken, were by him given up, is not admissible. *Smith (Lieutenant Governor) v. Cooper*, p. 401-405.

7. To such action, if the Constable plead, that the plaintiff in the attachment, having taken from a certain L. B.

a bond for the delivery of the attached effects, afterwards directed him to give them up to the debtor, with which direction he complied; he cannot introduce the said I B. as a witness to prove it. *Smith v. Cooper*, p. 401-405.

8. If the claim of the plaintiff, in an attachment against an absconding debtor, be stated as for a certain sum, due by negotiable note, with interest from the day when such note should have been paid; and the bond for prosecuting the attachment describe it, as sued out for the sum of money mentioned therein; (saying nothing of interest;) the variance is not material. *Smith v. Pearce*, p. 585-587.

9. Special bail, to replevy the attached effects, and a plea to the action ought to be received, in behalf of the defendant, upon an attachment issued against him as an absconding debtor; notwithstanding he did not (when solemnly called,) appear in person or by attorney; such bail and plea being offered at the term to which the attachment is returned executed, and before the judgment upon it is pronounced. *Ibid.*

ATTORNEIES IN FACT.

1. If A. give a power of Attorney, in due form, to B., authorising him "to draw checks, indorse notes, and generally to do all and every act and deed, towards the execution of his business at a certain bank;" and deposit the said power in the bank, to be inspected, when called for, by any person interested in matters relating thereto; he is bound to make good, to a bona fide purchaser for valuable consideration, any indorsement of a note negotiable at the said Bank, which B. may make in his name as his Attorney; notwithstanding the real object of the said power, verbally declared at the time of its execution, was to authorise B. to renew certain accommodation paper then in Bank, and not to indorse any other paper. *Mann v. King*, p. 428-430.

AVERMENTS.

1. The assignee of a bond can not recover against the assignor, upon a declaration stating that the plaintiff brought suit, and obtained a judgment, which was enjoined, upon a Bill claiming equitable discounts of certain dealings and transactions between the obligor

and the assignor before the assignment; and that the plaintiff was thereby entirely debarred from collecting the debt; without stating that the Injunction was made perpetual or what proceedings took place thereon. *McClung v. Arbuckle*, p. 315-316.

2. An action against a Collector of poor rates, upon his bond to the Overseers of the poor, can not be maintained without an averment in the declaration that the plaintiffs are Overseers at the time of the institution of the suit. *Horton & others v. Haymond and others*, p. 399-401.

3. In declaring upon a bond given by a public officer to the Governor and his successors, conditioned for faithful performance of official duty, it is not necessary to aver the non payment of the penalty to the obligee, or his successors, by any of the obligors. *Smith (Lieutenant Governor,) v. Cooper*, p. 401-405.

AWARDS.

1. Although infants are bound by judgments had under the superintendence and protection of the Court, yet, where the case is referred to arbitrators, whereby they are deprived of that protection, a submission, even by rule of Court, ought not to be sanctioned, even though the award be in their favour. For, as awards are in the nature of judgments, and are to be final and conclusive, which cannot be where one party has a right to avoid them; it follows that a submission by infants, although with adults, can not be obligatory on either party. *Britton v. Williams's devisees*, p. 453-454.

B.

BAIL.

1. A plea of *non est factum*, in behalf of a person returned as appearance bail, who denies that he ever executed the bail bond, is regular and proper. *Spotswood v. Douglas*, p. 312-313.

2. A person returned as appearance bail, who denies that he ever executed the bail bond, is not precluded from obtaining relief in equity, by his failing to appear and plead *non est factum* at law, after being informed that his name was subscribed to such bond; for if, in fact, he did not execute the bond, he had regularly no day in Court, and was therefore not bound to take any step for his

relief in the action at common law.—*Spoerwood v. Higginbotham*, p. 313-315.

3. The officer who returned the writ and bail bond, ought, as well as the plaintiff at law, to be made a party defendant to a Bill of Injunction filed by the person returned as bail, who denies that he ever executed the bond; for the Officer is *interested* in the question in controversy, and should be a party, that *final* and *complete* justice may be done. *Ibid*.

4. Special bail, to replevy the attached effects, and a plea to the action, ought to be received, in behalf of the defendant, upon an attachment issued against him as an absconding debtor; notwithstanding he did not (when solemnly called,) appear in person or by attorney; such bail and plea being offered at the term to which the attachment is returned executed, and before the judgment upon it is pronounced. *Smith v. Pearce*, p. 585-587.

BANKS.

1. The *bona fide* owner of a bank note, having transmitted one half thereof by the mail, which has been stolen therefrom, or is lost, can not demand payment from the bank of any part of it's amount, in consequence of *holding the retained half merely*; but he is entitled to demand the whole amount of the said note, on satisfying the bank of the verity of the above facts, or *establishing* them by the judgment of a Court of Equity, and giving, in either case, a satisfactory indemnity, to secure the bank against future loss, from the appearance and setting up, of the other half of such note. *The Bank of Virginia v. Ward*, 166-169.

BAR.

1. No verdict and judgment in *Ejectment*, can be relied on as a *bar* to a subsequent Ejectment; though for the same land, and between the same defendants and lessors of the plaintiffs; the *fictitious plaintiffs being not the same*. *Pollard v. Bayers & others*, p. 433-439.

2. A judgment for the defendant, upon pleadings not going to the *foundation* of the action, is no bar to the plaintiff's bringing another action for the same cause. *Lane v. Harrison*, p. 573-580.

BARGAIN AND SALE.

1. A deed of bargain and sale and release of land, from a person not in pos-

session, to another in the same predicament, (the land being, at the time, held by a third person with adverse title,) passes *nothing*, and therefore does not divest the bargainor of his right to recover in Ejectment. *Hopkins & Watson v. Ward*, p. 38-41.

2. Three demises were laid in a declaration in Ejectment; one, from the Patentee of the land *who was dead*; another from his *heirs*; and a third from a person to whom *they* had executed a deed of bargain and sale. The plaintiff recovered on the *second* demise; though not on the first or third. *See v. Greenlee*, p. 303-304.

BASTARD CHILDREN.

1. The Superior Courts of law have jurisdiction to grant Writs of *Supercedas* to orders of the County or Corporation Courts, binding persons accused of being fathers of bastard children, to support such children; and the Court of Appeals, in like manner, has jurisdiction, to correct errors in the decisions of the Superior Courts of law on the same subject. *Mann v. the Commonwealth*, p. 452-453.

2. A person accused of being the father of a bastard child, can not lawfully be bound to support such child, without a written charge before the magistrate, by it's mother; nor unless it appear that the warrant was issued by the magistrate upon the application of the *Overseers of the poor, or one of them*, or that they, or one of them, were parties to the cause in the Court making the order against such person. *Ibid*.

BILLS IN CHANCERY.

1. Where the Bill in Chancery is defective, not only for want of proper parties, but in other respects, so that no decree for the plaintiff can be entered, a decree dismissing the Bill altogether, ought to be affirmed;—but, if it appear probable, that something might be recovered upon a new bill properly drawn, such affirmance should be *without prejudice* to any other suit the plaintiff may be advised to bring. *Statt & others v. Baskerville & others*, p. 20-23.

2. A point similar to that in *Hough v. Shreve, & Munf.* 490, again decided; viz, that a bill of Injunction ought not to be dismissed at the next term after dissolution, (under the 3d section of the Act of January 20th, 1804,) if *such Bill*

have other objects besides those embraced by the Injunction. *Singleton v. Lewis & others*, p. 397-398.

BILLS OF EXCEPTIONS.

1. Upon the Court's overruling a defendant's motion for a new trial, if he file a bill of Exceptions to such opinion; stating all the facts proved to the Jury; from which it appears that, upon the merits, the plaintiff ought not to recover; the judgment ought to be reversed, and a new trial granted. *Keys v. McFarridge*, p. 18-20.

2. If a motion for a new trial on the ground that the verdict is contrary to evidence, be overruled, a bill of exceptions to the Court's opinion ought not to state all the evidence given in to the Jury, but only the facts appearing to the Court to have been proved. *Bennet v. Hurdaway adm'r of Jones*, p. 125-132.

BILLS OF EXCHANGE.

1. The payee of a draft or order, purporting to be for money lodged by the drawer in the drawee's hands, belonging to such payee, may recover of the drawer upon the drawee's refusing payment; (timely notice of such refusal being given;) though such draft or order be not negotiable as a bill of exchange; being drawn on a particular fund, not in favour of the payee "or order," nor, in terms, for value received. *Jolliffe v. Higgins*, p. 3-6.

2. If the drawer of a protested bill of exchange, being applied to, in behalf of the holder, for payment, acknowledge the debt to be just; and promise to pay it; saying nothing about his having received notice; the holder, in an action of debt upon the bill, against such drawer, is not bound to prove that notice was given him of the protest. *Walker v. Lowerty & Gantley*, p. 487-488.

BILLS OF REVIEW.

1. A Bill of review to a decree pronounced before the 11th of February 1814, (see Acts of 1813, c. 12. § 3,) could not be received after five years had elapsed from the date of such decree. *Shepherd v. Larue & Co.*, p. 529-531.

2. It is not necessary to plead the act of limitations against a bill of Review; for it ought to appear, in the Bill itself,

that it is exhibited within the time prescribed by law; or that the complainant is protected by some of the savings in the act; otherwise it ought not to be received. *Ibid.*

3. In such case, if the fact alleged to prevent the operation of the act, be not true, it may be denied by the answer of the other party; and, on the proofs, (if in his favour,) the bill of review should be rejected. *Ibid.*

4. It is not a sufficient ground for a bill of review, that certain documents on which the Complainant's right to a decree depended, and which he intended to exhibit with his original bill, were lost or mislaid by his Counsel, and not found until after the decree against him. *Jones v. Pilcher's devisees*, p. 425-427.

BILLS OF SALE.

1. A Bill of sale of personal property, (not being necessary to pass the title,) need not be shewn in evidence by persons claiming under the grantee, in a controversy between them and the grantor, or those claiming under him; for they may prove, by any other legal evidence, a title in the person under whom they claim; and such grantee, or his representatives, may prove their title by other evidence than the Bill of sale, unless it be alleged that such Bill of sale contains other matter than the mere transfer of the property, (and of which the grantor, or those claiming under him might avail themselves,) and notice be given to produce it: but in neither case can the substance or contents of the Bill of sale be given in evidence without due affidavit by the party, or other satisfactory proof, of its loss, or that it is not in the power of the party so offering the evidence. *Groves v. Manns*, p. 191-202.

BONDS.

1. Where an obligee covenants not to sue one of two joint and several obligors, (and, much more, where he binds himself not to sue him for a limited time only,) this does not amount to a release, but to a covenant only; and he may still sue the other obligor at law. *Ward v. Johnson*, p. 6-9.

2. The right of the assignee of a bond to demand payment thereof in a Court of Equity, which existed before the Statute authorizing him to sue at law in

his own name upon the assignment, is not impaired by that Statute; but the latter remedy is cumulative and additional to the former. *Winn v. Bowles*, p. 23-25.

3. In an action upon a bond for prosecuting an Injunction to stay proceedings on a judgment at law for a debt bearing interest; which injunction is dissolved and the Bill dismissed; the plaintiff is entitled to a verdict for the amount of the principal sum with lawful interest to the time of finding such verdict, the costs at law and in Chancery, (costs being awarded to the plaintiff by the decree,) with damages on the said principal sum at the rate of ten per centum per annum during the pendency of the injunction; although the condition of the bond be for payment of "the judgment, and costs of the injunction (if ruled to be paid by the complainant,) without mentioning damages." *Fox & Fowler v. Mountjoy*, p. 36-37.

4. If a bond be given in the usual form, for a penalty, conditioned to be discharged by payment of the principal at a future day, "with interest from the date if not punctually paid, such back-interest is to be considered an additional penalty, and not recoverable. *Waller v. Long* 71-79.

5. The Clause in our Act of Assembly (R. Code of 1819, Vol. 1st, p. 509,) which prescribes the sum for which judgment is to be rendered on a bond, meant that, in cases of penalties by way of security, the final justice of the case should be attained in the Courts of law; in effectuating which object, those Courts are to be governed by the same considerations which influence the Courts of Equity. *Ibid*.

6. A Bond from the deputy to the High Sheriff, conditioned for the faithful performance of his duty as deputy, "during his continuance in office," without specifying the length of time, is binding on him and his sureties for the transactions of one year only. *Munford v. Rice*, p. 81-83.

7. In debt on a bond, if the defendant plead that the same was obtained by false suggestions and misrepresentations by the plaintiff, "as per preamble in the said bond;" and the plaintiff join issue as to the fact, which issue is found against him by a Jury; whatever estoppel (if any) might have been to such plea, is thereby waived, and judgment ought to be for the defendant. *Chew executor of Wormley v. Moffett & wife*, p. 120-123.

8. Issue being joined on a plea that a bond was obtained by fraud, a Verdict, "for the defendant, because the Jury believe the bond was obtained by fraudulent means," is sufficiently positive and certain. *Ibid*.

9. According to the practice in our Courts of Equity, it seems that a Bill to set up a lost bond, need not be supported by the plaintiff's affidavit. *Cabell's ex'ors v. Megginson's adm'rs*, p. 202-207.

10. The vendor of a slave gave a bond to the buyer, with a condition, reciting that, whereas he had sold him a slave for a certain sum of money, if, therefore, the buyer should pay the said sum, and another sum annually for hire of the said slave, until he should pay the said purchase money; which he might do at any time, (when the said hire should cease;) then the vendor should convey to him a lawful right and title to the said slave; which title in the mean time should remain in the vendor. The buyer was not entitled, under this bond, to the possession and property of the slave, but the vendor could recover in detinue. *Ervine v. Dotson*, p. 231-232.

11. A plea of non est factum, in behalf of a person returned as appearance bail, who denies that he ever executed the bail bond, is regular and proper. *Spotswood v. Douglas*, p. 312-313.

12. An action of debt may be brought upon a three months replevy bond for rent, though it give back interest from the time when the rent became due, and not merely from the date of the bond; which circumstance, the Court were inclined to think makes it not a good bond under the Statute. *Early v. Owen*, p. 319-320.

13. If, to a declaration in debt on a bond for making a title to a tract of land, the defendant plead "covenants performed," and a verdict and judgment be rendered, (as in covenant,) for damages for non-performance; saying nothing of the penalty of the bond; such judgment ought not to be reversed at the instance of the defendant; for such irregularity can not be injurious to him; because the true ground of the action appears by the declaration, and the satisfaction thereby demanded extending the whole injury, the action can in no form be repeated. *Pate v. Spotts*, p. 394-397.

14. In debt on a bond, conditioned that the obligor shall make a title to a tract of land, when thereunto lawfully required; if the defendant plead covenants performed, and issue be joined there-

upon, the plaintiff is not bound to prove on his part any *demand* of a deed. *Ibid.*

15. If the writ be in *Covenant*, and the declaration in *debt*, to which the defendant pleads "Covenant performed;" the writ (though not made part of the record by *Oyer*) may be resorted to at the trial, to shew the true date of the *institution of the suit*; and the Court may instruct the jury that a deed executed *after the date of the writ*, (though before the filing of the declaration) is no performance of the condition of the bond declared upon. *Ibid.*

16. Where an appeal is taken in *Court*, the appeal bond cannot legally be given in the *Clerk's office*. *Thomson & O'Neal v. Evans*, p. 397.

17. *Quere*, whether any action can be maintained on a bond executed to "C. H. &c. overseers of the poor of M. County," with a condition, that, "if the first named obligors shall well and truly collect, from the Tythables of said County, the poor rate for the year " and pay the same to the orders " of the said overseers, then the said " obligation is to be void " &c.? *Horton and others v. Haymond & others*, p. 399-401.

18. In declaring upon a bond given by a public officer to the Governor and his successors, conditioned for faithful performance of official duty, it is not necessary to aver the *non payment* of the penalty to the obligee, or his successors, by any of the obligors. *Smith, (Lieutenant Governor,) v. Cooper*, p. 401-405.

19. See SHERIFFS; *Mountjoy & Triplet v. Banks's ex'or & devisees*, p. 387-389.

20. See PARTNERSHIP; *Poindexter v. Waddy*, p. 418-422.

21. See HEIRS; *Wilders v. Chambliss's adm'x & heirs*, p. 432-433.

22. See ASSIGNMENTS; *Johnston v. Hackley*, p. 448-450.

23. See FRAUD; *West's executor v. Logwood*, p. 491-506.

24. See MORTGAGES; *Colquhoun v. Atkinson*, p. 550-557.

25. See SHERIFFS; *Lane v. Harrison*, p. 573-580.

BOOKS.

1. A charge of Usury being explicitly denied by the defendant's answer, the plaintiff has not a right to an order requiring him to produce his books and papers, for the purpose of establishing

such charge. *Greenhaw's adm'x v. Harris*, p. 472-484.

BOUNDARIES.

1. See COMPROMISE; *Zane's devisees v. Zane*, p. 406-417.

BREACH.

1. In charging a breach of the condition of a Sheriff's bond, if it was alleged that he failed to return, to the office of the *Clerk of the County*, a forthcoming bond taken upon an execution from the *Superior Court* of law, such assignment of a breach was so defective that judgment for the plaintiff could not be rendered upon it, in a case occurring before the 1st of January 1820. *Lane v. Harrison*, p. 573-580.

C.

CASE AGREED.

1. In a case agreed, the parties, after setting forth a *clause* in a Will by which a limitation over, in favour of the plaintiff, was to take effect upon the death *without lawful issue* of a legatee of a particular estate, proceeded to state that the said legatee, being more than twenty one years old, died without leaving any children living at the time of her death; having had only one, who was dead at that time. This was adjudged a defective case, and a *verdict nono* was awarded; because there might nevertheless, have been *issue* of the said legatee, living at the time of her death; and also, because the *whole* Will was not stated. *James v. McWilliams*, p. 301-302.

CAVEATS.

1. In a *caveat* case, if it be found by the Jury, or agreed by the parties, that, since the institution of the *Caveat*, a Grant from the Commonwealth of the land in controversy, has been obtained by the Caveatee; judgment ought to be entered dismissing the *Caveat*; but such judgment to be no prejudice to any suit in Chancery which the Caveator may be advised to bring to vacate the said Grant, or any grant that may issue to the Caveatee in consequence of such judgment of dismissal; the judgment on the *caveat* being, in that event, not

pronounced on a comparison of the respective rights of the parties. *Guerrant v. Bagby*, p. 160-163.

2. The general principle laid down in the case of *Noland v. Cromwell*, 4 *Munf.* 153, does not apply to a case in which the rights of the parties can not be adjusted in the Court of *Caveat*, but the aid of the Court of *Equity* is necessary to give to each his proper share of the land for which one has improperly obtained a Patent. *Christian's devisee v. Christians*, p. 534-541. See *EQUIT*.

CHANCERY.

1. A prosecution under the 13th section of the Act of 1793 concerning incestuous marriages, was a criminal prosecution, and therefore, it seems, the direction therein, that such prosecution should be instituted in the High Court of Chancery, was unconstitutional. *Attorney General v. Broadbush & wife*, p. 116-117.

2. Agreeably to the practice in this State, a subpoena in Chancery with an endorsement thereon, "to stop the debts and effects of the absent defendants in the hands of the defendants within the State, (mentioning their names,) "to satisfy a debt due from the absent defendants to the plaintiff," operates, from the time of the service of that process on the defendants within the State, as an attachment to stop the payment by them of monies due from them to the defendants, and to inhibit a transfer thereof from the said absent defendants to other persons. *Williamson & others v. Bowie & others*, p. 176-180.

3. An attachment in Chancery lies to secure a debt payable at a subsequent day, or to relieve the indorser of a note payable after the date of such attachment, which binds the property in the hands of the garnishee from the time of its service, so as to inhibit the absent defendant's making a transfer thereof, even for the benefit of a creditor whose claim is already due and payable. *Ibid.*

4. A creditor residing in Maryland, may sue out an attachment in Chancery in Virginia, against his debtor, residing also in Maryland, and others residing in Virginia, indebted to, or having in their hands effects of, such debtor. *Ibid.*

COMPROMISE.

1. A widow, (being entitled, under the Will of her husband, to make a crop

on his home plantation in conjunction with one of his sons, and to a sufficiency of corn and pork, with necessary working utensils, for her support and that of her family, the first year, on a plantation directed to be purchased by her,) agreed to give up, to two of the persons named as executors, (one of whom only, with a third person, administered,) her part of the crop, then growing, upon condition that they should purchase as much corn and provisions, the ensuing winter, as herself and a friend of her's should judge sufficient, to settle her on the said plantation; which was accordingly done. This was held a binding compromise of her right to the share of the crop. *Daniel and Wife v. McClina*, p. 61-64.

2. The considerations of compromising doubtful rights and settling boundaries, are not only good, but favoured in law. *Zane's devisees v. Zane*, p. 406-417.

CONDITIONS.

1. If the writ be in *Covenant*, and the declaration in *debt*, to which the defendant pleads *Covenant performed*; the writ (though not made part of the record by *Oyer*) may be resorted to, at the trial, to shew the true date of the institution of the suit; and the Court may instruct the jury that a deed executed after the date of the writ, (though before the filing of the declaration,) is no performance of the condition of the bond declared upon. *Pate v. Spotts*, p. 394-397.

CONFESSION OF JUDGMENT.

1. The majority of the Court were inclined to think that a surety is exonerated in equity though not at law, by the plaintiff's accepting a confession of Judgment from the principal, and covenanting, thereupon, to grant him a stay of execution for a limited time; the surety not having assented to such new contract and compromise. *Ward v. Johnson*, p. 6-9.

2. Upon a *scire facias* against heirs and devisees, to revive a judgment in Ejectment, if one of the defendants confesses the plaintiff's right to revive the judgment in the *scire facias* mentioned; and thereupon judgment be entered against him, that the plaintiff have execution for the whole tract of land in question; there is no error in such judgment, of which he can take advantage. *Jones v. Doe lessee of Carter*, p. 105.

CONSIDERATION.

1. A defendant, being party or privy to a deed, can not avoid it, in a Court of common law, by *parol* evidence, on the ground of *want of consideration*;—for he is *estopped* from averring such matter against a *specialty*. *Taylor v. King*, p. 358—367.

2. The considerations of *compromising doubtful rights, and settling boundaries*, are not only good, but favoured in law. *Zane's devisees v. Zane*, p. 406—417.

3. See FRAUD; *West's executor v. Logwood*, p. 491—506.

CONSTABLES.

1. In a suit against a constable for breach of duty in not delivering to the Sheriff, in obedience to the Court's order, attached effects in his hands, testimony on his part to prove that any of those effects were not the property of the person against whom the attachment issued, and, therefore, *after being taken, were by him given up*, is not admissible. *Smith (Lieutenant Governor) v. Cooper*, p. 401—405.

2. To such action, if the constable plead, that the plaintiff in the attachment, having taken from a certain I. B. a bond for the delivery of the attached effects, afterwards directed him to give them up to the debtor, with which direction he complied; he can not introduce the said I. B. as a witness to prove it. *Ibid.*

CONSTRUCTION OF LAWS.

1. The law of *Waste*, in it's application *here*, must be varied and accommodated to the circumstances of our new and unsettled Country. *Findlay v. Smith & wife*, p. 134—155.

2. The provision contained in the 54th section of the Act concerning Wills &c., (R Code of 1819, 1st Vol. p. 388,) which provides that the Emblements severed between the 1st of March and 31st of December in any year, shall be *assets* in the hands of the Executors, did not apply to the case of an estate for life held under a marriage contract *dated* in 1766; though the tenant for life died in 1801, and that section, originally enacted in 1785, took effect on the 1st of January 1787.—*Thompson's adm'r v. Thompson's ex'or*, p. 514—519.

CONSTRUCTION OF WILLS.

1. In supplying words in a Will, it is the most correct course to supply such only as it is *evident* the testator *intended* to use, and not such, *also*, as would be necessary to *effectuate* the supposed intention of the testator. *Lynch & wife v. Hill & wife*, p. 114—116.

2. Wherefore, the words of a contingent limitation being, "*in case S. N. C. without issue of body lawfully begotten*, then," &c., the words, "*die*," and, "*her*," may be supplied as evidently intended by the testator, but not the word "*leaving*," which he might not have known to be necessary in law to give the limitation effect, and therefore might not have intended to use. *Ibid.*

3. A devise of certain salt works to the testator's *wife* and two *near relations* of his, *during her lifetime*, subject to the payment of sundry legacies to a large *amount*, was construed, in this case, as authorising the devisees to make an *unlimited* use of the salt mineral, and of the woodland of the devisor from which fuel was supplied in his lifetime for carrying on the works. *Findlay v. Smith & wife*, p. 134—155.

4. In a doubtful case, the Court should lean against a construction, which, in effect, would leave the *daughters* destitute of a *permanent* provision, by giving them *personal*, instead of *real* property. *Carrington's executors v. Bell & wife*, p. 374—377.

5. See POWERS; *Ibid.*

CONTINUANCE.

1. Under what circumstances, a continuance ought to be granted, on the ground of the absence of witnesses; without positive proof, that the *subpoenas* were *delivered* to the Sheriff of the County, or sent to the Sheriff of any other County. *Deford v. Hayes*, p. 390—391.

CONVEYANCES.

1. An agreement for the sale of land being, that the vendor shall make and execute deeds of conveyance, and the vendee shall pay, *on the day of the execution of the said deeds*, part of the purchase money, and give bonds for the balance, as soon as the quantity, (supposed to be a certain number of acres,) can be ascertained by an accurate survey,

the vendee is not bound to make the said payment, nor give bonds for the balance, until the vendor shall first have made or tendered the conveyance; notwithstanding a survey ascertaining the quantity of the land has been made.—*Spindle's adm'x v. Miller's exors* p. 170-173.

2. If the terms of the agreement be, that the Vendor binds *himself* to make the conveyance, and the vendee binds *himself and his heirs* to make the payment &c., on the day of the execution of the conveyance; and no conveyance be made or tendered by the Vendor in his lifetime; the Vendee is not bound to accept a conveyance from his heirs, but may waive the contract altogether. *Ibid*.

3. In decreeing a partition in favour of a plaintiff claiming by equitable title, the Court ought not to direct that the holders of the legal title stand seized of the plaintiff's part to his use; but that they convey the same, by deed, to him and his heirs. *Christian's devise v. Christians*, p. 534-541.

COSTS.

1. A Court of Chancery ought not to give costs, (against complainants,) to parties erroneously made by its own direction. *Lewis & others v. Thornton & wife*, p. 87-98.

2. Damages ought not to be given upon the affirmation of a decree dismissing a bill with costs; for such decree is not rendered, "for any sum of money or quantity of tobacco," except the costs. *Williamson & others v. Bowie & others*, p. 176-180.

COURTS.

1. Upon a motion for a new trial on the ground that the damages found by the Jury are excessive, if the plaintiff release such part thereof as, in the Court's opinion, ought to be released; and thereupon judgment be entered for the residue; such judgment, not appearing unreasonable, should be sustained by the appellate Court. *Preston v. Bowen*, p. 271-277.

2. The whole proceeding upon a demurrer to evidence, is under the control of the Court before whom the trial is had. If, therefore, by mistake or otherwise, a material fact, on which the point in issue depends, and which the Court judicially knows to exist, be omitted in such demurrer, it ought to be

set aside, as too uncertain for a judgment to be given thereon; and this upon an appeal taken by either party.—*Taliaferro v. Gatewood*, p. 320-328.

COVENANT.

1. Where an obligee covenants not to sue one of two joint and several obligors, (and, much more, where he binds himself not to sue him for a limited time only,) this does not amount to a release, but a covenant only; and he may still sue the other obligor at law. *Ward v. Johnson*, p. 6-9.

2. Upon a covenant to make a good title to certain lots of land, (according to a plat for extending the streets of a town, (including the use of the street, and appurtenances therein mentioned,) and that the Covenantor, his heirs and assigns, may at all times thereafter, enter into, possess and enjoy the said lots, with the streets &c., without the let, hindrance or molestation of the Covenantor, his heirs and assigns, a Court of Equity, by Injunction, will compel the Covenantor, his heirs and assigns, to remove all obstructions by them put in the said streets, and open the same to the free and full use of the covenantor, his heirs and assigns, and to permit him and them ever thereafter to use the same, without let, hindrance or molestation. *Brooke v. Barton*, p. 306-307.

3. It is not necessary, in the declaration for Covenant broken, to recite the whole of the agreement, but only to describe substantially the material parts, as to which breaches are alleged. *Backus v. Taylor*, p. 488-490.

4. In Covenant upon an agreement of lease, which, besides the stipulation to pay the rent, contained other clauses, binding the lessee to board the lessor and wife part of the term, and to return the premises uninjured, the declaration described so much of the agreement as related to leasing the property and paying the rent; charging the defendant with having broken the covenant generally, and particularly in failing to pay the rent; but said nothing about the other stipulations. It was decided that this was not a substantial variance. *Ibid*.

CREDITORS.

1. A creditor having obtained judgment against the executors of the surety for the debt, is not bound to take out

execution, before he can file his Bill in Equity, for an account of the personal and real estates of the principal and surety, and to get satisfaction out of the real in default of the personal assets.—*Duval's ex'or v. Trent's devisees & others*, p. 29-31.

2. Under what circumstances, such Bill may be filed. *Ibid.*

CRIMINAL PROSECUTIONS.

1. A prosecution under the 13th section of the Act of 1792, concerning incestuous marriages, was a criminal prosecution; and therefore, it seems, the direction therein, that such prosecution should be instituted in the High Court of Chancery, was unconstitutional. *Attorney General v. Broadbush & Wife*, 116-117.

CROPS.

See EMBLEMENTS; *Thompson's adm'r v. Thompson's ex'or*, p. 514-519.

D.

DAMAGES.

1. Damages ought not to be given upon the affirmation of a decree dismissing a bill with Costs; for such decree is not rendered, "for any sum of money or quantity of tobacco," except the costs. *Williamson & others v. Bowie & others*, p. 176-180.

2. Upon a *scire facias* to revive a judgment, in debt, for a penal sum, to be discharged by principal and interest; if the defendant confess judgment according to the *scire facias*, the plaintiff is not entitled to a writ of enquiry of damages, to recover more than the penal sum; (the principal and interest accruing by lapse of time, amounting to more;) but must take execution upon the original judgment, with the addition, only, of the costs upon the *scire facias*. *Cosby's ex'or v. Bell's adm'r*, p. 282-283.

3. It seems that, in trespass *vi et armis*, a declaration charging by way of aggravation of damages, a special pecuniary loss, occasioned by the trespass, was good after verdict, even before the act of Jeofails which took effect, January 1st, 1820. *Dimmett & others v. Bakridge*, p. 308-311.

4. See FATHER AND CHILD; *Parker v. Elliott*, p. 587-589.

DECLARATION.

1. A plaintiff in Ejectment may recover under one or the other, of two demises, of the same land, from different persons. *Hopkins & Watson v. Ward*, p. 38-41.

2. Actions may be brought in the Courts of this State, upon contracts entered into; or personal injuries committed, any where. In general, it is not necessary to state in the declaration, where the contract arose, or the injury was committed: but this is sometimes necessary; and, then, (for the sake of obviating the objection of a variance, or the like,) the plaintiff is permitted to state, by a fiction, under a *videlicet*, that the place is within the jurisdiction of the Court in which the suit is brought, which fiction, being in furtherance of justice, can not be traversed. *Shaver v. White & Dougherty*, p. 110-114.

3. A declaration in behalf of a mercantile Company, by the name of the firm, (without mentioning the names of the partners,) is good after a verdict for the plaintiffs upon the general issue.—*Pate v. Bacon & Co.* p. 219-220.

4. Evidence offered to the Jury, and properly applying to the issue joined, ought not to be rejected on the ground of objections to the declaration. *Preston v. Bowen*, p. 271-277.

5. It seems that, in trespass *vi et armis*, a declaration charging, by way of aggravation of damages, a special pecuniary loss, occasioned by the trespass, was good after verdict, even before the act of Jeofails which took effect January 1st, 1820. *Dimmett & others v. Bakridge*, p. 308-311.

6. The assignee of a bond can not recover against the assignor, upon a declaration stating that the plaintiff brought suit; and obtained a judgment, which was injoined, upon a Bill claiming equitable discounts on account of certain dealings and transactions between the obligor and the assignor before the assignment; and that the plaintiff was thereby entirely debarred from collecting the debt; without stating that the injunction was made perpetual, or what proceedings took place thereon.—*McClung v. Arbuckle*, p. 313-316.

7. In debt on a bill penal, a judgment, entered upon *nil dicit* or *non est informatus*, ought not to be reversed, on the ground that the declaration, though describing the bill penal correctly as to the principal sum, penalty, and date, omits

to mention that the debt is payable, "with Interest from a day prior to the date:" and that the judgment, in conformity with the bill penal, is entered, for the penalty, to be discharged by the principal, with such interest and costs. *Harper v. Smith*, p. 389-390.

8. An action against a Collector of poor rates, upon his bond to the Overseers of the poor, can not be maintained without an averment in the declaration that the plaintiffs are Overseers at the time of the institution of the suit. *Horton & others v. Haymond and others*, p. 399-401.

9. In declaring upon a bond given by a public officer to the Governor and his successors, conditioned for faithful performance of official duty, it is not necessary to aver the non payment of the penalty to the obligee, or his successors, by any of the obligors. *Smith (Lieutenant Governor.) v. Cooper*, p. 401-405.

10. See DETINUS; *Bogges v. Bogges*, p. 486-487.

11. It is not necessary in the Declaration for Covenant broken, to recite the whole of the agreement, but only to describe substantially the material parts, as to which breaches are alledged. *Backus v. Taylor*, p. 488-490.

12. See COVENANT; *Ibid*.

13. In *assumpsit* upon a written agreement, an express promise ought to be laid in the declaration:—a mere recital of the writing, though a true copy, is not sufficient. *Woody v. Flournoy*, p. 506-510.

14. In charging a breach of the condition of a Sheriff's bond, if it was alledged that he failed to return, to the office of the Clerk of the County, a forthcoming bond taken upon an execution from the Superior Court of law, such assignment of a breach was so defective that judgment for the plaintiff could not be rendered upon it, in a case occurring before 1st of January 1820. *Lane v. Harrison*, p. 573-580.

15. After the Court of Appeals have passed upon a case, and remanded the cause for a new trial upon the general issue, a plea in abatement or demurrer to the declaration, upon the ground that the Christian names of the respective parties are not mentioned therein, ought not to be received. *Lanier, Shelton & Cooke v. Cooke, Granford & Company*, p. 580-581.

16. Trespass on the case may properly be brought by a father, for loss of the service of his daughter, and expences

incurred by him in consequence of her being debauched and got with child; no forcible injury to himself or his property being alledged in the declaration. *Parke v. Elliott*, p. 587-589.

17. What is the proper form of the declaration in such case. *Ibid*.

DECREES.

1. A decree against executors for a legacy, though made upon confession of assets, and without their expressly demanding bond and security from the plaintiff, is yet erroneous, if it do not require such bond and security to be given before the defendants be compelled to pay the legacy. *McRae's ex'rs. v. Brooks & wife*, p. 157-159.

2. A final decree by default may be set aside at a subsequent term, for good cause shown; in a case where relief can, not be given by bill of review, or bill to impeach the decree for fraud in obtaining it. *Erwin v. Vint*, p. 267-271.

3. In this case, the circumstances, shewn were, that the defendant against whom the decree was rendered, was prevented, by mistake and accident, from filing his answer, and that in fact his title was good to the land in controversy. *Ibid*.

4. A Court of Equity may decree in favour of one defendant against another, (in a case where the same decree operates in favour of the complainant,) by subjecting, in the first instance, that defendant who ought ultimately to pay the debt. *McNeil & Turner v. Baird*, p. 316-318.

5. Upon a bill for partition of land; a person who claims part thereof by adverse title, being made one of the defendants for the purpose of obtaining a surrender of title deeds, and a conveyance of such part, from him; if the Court decree against him, "that the said deeds be set aside and declared void, and "that the title of the complainants to "the lands in the bill mentioned, be "quieted;" and, by consent of parties, the cause be continued as to the other defendants:—*querre*, whether such a decree be final, or interlocutory, as to him?—*Alexander's heirs v. Coleman & wife*, p. 328-352.

6. *Querre*, whether an appeal can not be taken as of right, from a decree which is final as to one of the defendants, whose claim is adverse to that of the plaintiffs and all the other defendants, as to whom the cause is continued in Court? *Ibid*.

7. If it be stated, in the transcript of a decree in Chancery, that "the cause" came on to be heard on the bill, answer and exhibits; such hearing must be understood to have been in *exclusion of the depositions* contained in the record; no proof appearing of notice of the time and place of taking those depositions. *Shumate v. Dunbar*, p. 430-431.

8. In such case, if the Answer deny the equity in the bill, and be not impugned by the exhibits, a decree in favour of the plaintiff should be reversed, and the bill dismissed. *Ibid*

9. See SALES; *Anderson's adm'r v. Davies's adm'r*, p. 484-486.

10. See ANNUITIES; *Mayo v. Tomkies*, p. 520-528.

11. See MORTGAGES; *Ibid*.

12. See BILLS OF REVIEW; *Shepherd v. Larue*, p. 529-531.

DEEDS.

1. A *cestuy quo trust*, after the purposes of the deed have been satisfied, may maintain Ejectment, upon a demise in his own name, although the legal estate is still in the trustee. *Hopkins & Watson v. Ward*, p. 38-41.

2. Upon a bill of Injunction exhibited by husband and wife and their trustee, to prevent the husband's creditors from selling property covered by a deed of marriage settlement; the deed appearing, on its face, and by the oaths of all the complainants, including the trustee, (who appeared to have no interest except as a party to the suit,) to have been executed before the marriage; and it not being charged in the answers, or any of them, that the said deed was *in fact ante-dated*; though not attested by any subscribing witness, but admitted to record upon acknowledgments of the parties only; and though the defendants, in their answers, averred, that the said acknowledgments took place after the marriage; the Court could not with propriety dissolve the Injunction, on the ground that the said Deed was *ante-dated*. *Scott & Wife v. Lorraine & others*, p. 117-119.

3. A suit in Chancery properly lies, against a defendant, who, claiming title under a deed alledged to be fraudulent, hath taken possession of and converted to his own use sundry articles of personal property; the plaintiff praying the Court to set aside such fraudulent deed, and compel the defendants to render a just account of the property so wrong-

fully taken, and to pay the value thereof to the plaintiff. *Cocke v. Harrison*, p. 184-185.

4. If a purchaser to whom a deed has been fully executed, or one claiming under him, put the deed into the hands of the vendor, that he may acknowledge it for the purpose of having it recorded; such delivery is not a surrender of the title under the deed. *Reese v. Holliday & Welch*, p. 251-261.

5. See FRAUD; *Taylor v. King*, p. 358-367.

6. See CONSIDERATION; *Ibid*.

7. See TRUSTEES; *Ibid*; and *Harris v. Harris*, p. 367-368.

8. See EVIDENCE; *Bumgardner & others v. Allen*, 439-447.

9. An agreement was made between two unmarried sisters, that the property of the one who should die first, or be first married, should, in either event, belong to the other; in consideration of which agreement, one of them, by a deed of gift executed two days before her marriage, conveyed all her slaves to her said sister, who, after the marriage, lived partly with her, and partly with her brother; permitting the husband, (who was in embarrassed circumstances,) to have the use of the slaves; except two, whom the donee retained in her own immediate employment, and principally to wait upon herself. This deed, though admitted to record on the oath of one of the subscribing witnesses, only, who also swore to the hand-writing of another who was dead, was adjudged not to be fraudulent as to the creditors of the husband; notwithstanding a judgment for a debt had been rendered against him, and was unsatisfied, when it was executed, and when the marriage was solemnized. *Prior & others v. Kinney's ex'ors*, p. 510-514.

10. In general, a deed is to be taken as having been executed on the day of its date, unless it appear to have been on some other day. *Colquhoun v. Atkinson*, p. 550-557.

11. The testimony of the person who executed the deed, was received as fixing the time when it was executed; notwithstanding the testimony of two witnesses to his acknowledgment to the contrary when not on oath; he being entirely disinterested between the parties, and the falsehood of his evidence being not probable under the circumstances of the case. *Ibid*.

12. A creditor by mortgage or deed of trust, has not a right, *without a written agreement, to tack to such mortgage, or deed of trust, a note or bond of the debtor, in exclusion of another mortgage or deed of trust, bearing date either before or after such note or bond. Ibid.*

13. A deed of gift of slaves to a married woman, "to her own special use, and afterwards to her heir or heirs; with a clause providing that, "if she shall die "without heir or heirs, or without a "Will disposing of the said slaves and "their increase, they shall return to the "donor or his heirs;" conveys the property to the *separate* use of the wife, so that, after the death of the husband, she is entitled to hold the slaves and their increase, against his administrators. *Smith v. Smith's adm'rs.* p. 582-584.

DEFENDANTS.

1. Note a case, in which a decree in Chancery may be rendered in favour of the plaintiff at law, (though defendant in Equity,) if justice should require it. *Spotswood v. Higgenbotham*, p. 313-315.

2. A Court of Equity may decree in favour of one defendant against another, in a case where the same decree operates in favour of the Complainant, by subjecting in the first instance that defendant who ought ultimately to pay the debt. *McNeil & Turner v. Baird*, p. 316-318.

3. See PRACTICE; *Christian's devisee v. Christians*, p. 534-541.

4. See INJUNCTIONS; *Poindexter v. Waddy*, p. 418-422.

DEFICIENCY.

1. Though a purchaser of a tract of land agree to pay so much by the acre, yet if he also agree to take it by the patent, or survey already made, as fixing the number of acres in the tract, (without any fraud, concealment, or misrepresentation, on the part of the vendor,) he thereby takes upon himself the risk as to quantity; by which he might be gainer or loser; and therefore is not entitled to any compensation for a deficiency. *Fleet v. Hawkins*, p. 188-191.

DEMURRERS.

1. The whole proceeding upon a demurrer to Evidence, is under the control of the Court before whom the trial is had. If, therefore, by mistake or otherwise, a material fact on which the point in issue depends, and which the Court judicially knows to exist, be omitted in such demurrer, it ought to be set aside, as too uncertain for a judgment to be given thereon; and this, upon an appeal taken by either party. *Tatiasferre v. Gatewood*, p. 320-328.

2. In an action by the assignee against the assignor of a bond, the point in dispute being whether the assignee has used due diligence in suing the obligor; if the plaintiff produce a transcript of the proceedings in a suit which he brought against the obligor, shewing the time when the declaration was filed, *but not the date of the Writ*; and the defendant demur to the evidence; the Court not interfering nor requiring a Copy of the Writ to be produced; such demurrer should be set aside, and a *venire de novo* awarded. *Ibid.*

3. When a demurrer to a bill in Chancery is overruled, a decree ought not to be pronounced against the defendant, but leave should be given him to file an Answer. *Sutton v. Gatewood & wife*, p. 398-399.

4. A demurrer to a Bill in Chancery, against a Guardian for advances of money &c. by the plaintiff for the use of the Ward, ought not to be sustained on the ground that the Ward ought to have been a party:—but if, upon the Answer of the Guardian, it should appear proper, the Court should then direct the Ward to be made a party. *Ibid.*

5. See DECLARATIONS; *Lanier, Shelton & Cocke v. Cocke, Crawford & Company*, p. 580-581.

DEPOSITIONS.

1. *It seems*, that a deposition taken *de bene esse*, by two magistrates, and with due notice, (it appearing that an order of Court was made awarding a commission to take it, and that the Clerk charged a fee for issuing the commission,) may be read as evidence; on proof of inability of the Witness to attend; notwithstanding there be no other proof that it was taken by virtue of a Commission delivered to the magistrates, (no commission being found among the papers,) and it was returned to the Clerk's office open and unsealed, but without being shewn to have been

erased or altered. *Givens v. Manns*, p. 191-202.

2. The deposition of a person under whom the party claims, in whose favour it is offered, is not admissible as evidence, unless it appear from the deeds that no recourse can be had against that witness in case of eviction; and this, though a release to the witness be executed by such party, before the deposition is read to the Jury, *but after it was taken*; and though, at a former trial of the cause, before the deposition was taken, a release was *tendered*, in the presence of the Court, by another person (under whom such party immediately claimed,) of all claim which such other person might have, in any event, against the witness, on account of the subject in controversy; the necessity of which release from that person was at that time agreed to be waived by the opposite party. *Woodward v. Woodson's heirs*, p. 227-229.

3. If it be stated, in the transcript of a decree in Chancery, that "the cause came on to be heard on the bill, answer and exhibits; such hearing must be understood to have been in *exclusion of the depositions* contained in the record; no proof appearing of *notice* of the time and place of taking those depositions. *Shumate v. Dunbar*, p. 430-431.

DESCENTS.

1. Under the 5th section of the Act of Descents of 1792, where an infant died without issue, having title to certain real estate derived by descent immediately from the father; leaving no relations in the paternal line, but a Grandmother and Uncle; the grandmother was not entitled to inherit any part of such estate, but the paternal uncle was entitled to the whole. *Ligon v. Fuqua & wife*, p. 281-282.

2. Before the 1st of January 1787, (when the Act of Descents took effect,) if a person entitled to a reversion in fee, expectant upon an estate for life, died in the lifetime of the tenant for life, such person never had *seisin* of the inheritance, and therefore could not transmit it to *his* heir; but the heir of the person *last actually seised* was entitled. *Dickenson & others v. Holloway*, p. 422-425.

3. A testator who died in the year 1781, devised a tract of land to his Wife for life, and at her death to be equally

divided among his three sons and their heirs. The *eldest son died before the 1st of January 1787*, intestate, and without issue; and the Widow died *after that day*. At her death, the second son was entitled to one third of the land in his own right, and to the *whole* of another third as heir to his father, who was the person *last actually seised* of the freehold and inheritance. *Blankenbaker v. Blankenbaker*, p. 427-428.

DETINUE.

1. After a judgment in detinue, a new action of detinue against the same defendant for the same thing, in which the former Judgment is not declared upon, but is only relied on as evidence of title, can not be maintained. *Withers's executrix v. Withers's executor*, p. 10-12.

2. *Quere*, whether any action, other than a *scire facias*, can be maintained upon a Judgment in Detinue? *Ibid*.

3. If the declaration in detinue do not contain a demand, "that the defendant *render* to the plaintiff," the property sued for; yet, after verdict on the plea of *non detinet* judgment ought not to be arrested. *Baggess v. Baggess*, p. 486-487.

DEVASTAVIT.

1. *Quere*, if an executor die indebted to the estate of his testator, without any judgment or decree against him for the balance due; and his executor, *without notice of such debt*, apply the assets of his estate to the payment of debts of inferior dignity;—is he guilty of a *devastavit*? *Boyd ex'or. of Hoskins v. Kaufmans*, p. 45-47.

DEVISEES.

1. *It seems*, that, if a Judgment be rendered, in a Federal Court, against the executors of a *surety*, and they pay the money; they can not recover it against a *devisee* of the principal debtor, by *motion*, or any action at *common law*, in the General Court or any other Court of law, of this Commonwealth. *Cabell's ex'ors v. Magginnson's adm'rs*, p. 202-207.

2. In a suit in Chancery, to foreclose a mortgage, against purchasers claiming under a devisee of the mortgagor, not only the persons from whom they imme-

devises derive their title, but, also, such devisee or his heirs, and all other devisees of the equity of redemption, ought to be made parties; notwithstanding such equity was devised to some of them upon conditions; for whether such conditions were complied with, can not be legally investigated, until they are made parties. *Mayo v. Tomkies*, p. 520-528.

3. It is not sufficient to make a person a party as *Executor*, and to call upon him to answer *as such*, if he be interested in the controversy *as a devisee*, or should be called upon to answer as to his *individual* interest or transactions.—*Ibid.*

4. See PARTIES; *Ibid.*

DEVISES.

1. Certain real and personal estate being devised to S. N. C., "*her heirs*, and "*assigns for ever*; but, in case she should "*die without issue of her body lawfully begotten*, then and in that case, to be "*equally divided between S. C. and S. H, to them and their assigns forever.*" this limitation over was too remote, and could not take effect. *Lynch & wife v. Hill & wife*, p. 114-116.

2. A devise of certain salt-works to the testator's wife and two near relations of his, *during her life time*; subject to the payment of sundry legacies to a large amount; was construed, in this case, as authorizing the devisees to make an unlimited use of the salt mineral, and of the woodland of the devisor from which fuel was supplied in his lifetime for carrying on the works. *Findlay v. Smith & wife*, p. 134-155.

3. A testator devised to the President and Professors of a College, and their successors in office forever, 500 bushels of Corn, "*to be paid them annually on the 25th of December*, for the establishment and support of a free school; directing that 1000 acres, part of a certain tract of land, to be laid off by metes and bounds within twelve months after his decease, stand *pledged for ever*, for the full and complete execution of this devise. By other clauses, he bequeathed sundry pecuniary legacies to a large amount; directing particularly, in each bequest, payment to be made *by his Executors*. He also emancipated all his slaves, and devised to his sisters all the residue of his estate. It was decided, that the devise to the free school was not a charge upon the estate generally, but upon the 1000 acres of land only.—

William & Mary College v. Hodgson & others, p. 163-165.

4. A testator, in the year 1803, devised the residue of his estate to his brother Isaac; in case he died without issue, to be equally divided between his uncle's children; (naming them;) *without adding any words of perpetuity*. This limitation over was good, and took effect, upon the death of Isaac without issue at the time of his death. *Gresham v. Gresham and others*, p. 187-188.

5. A testator devised to his wife during her natural life, all his lands in one County, with the use of his negroes, stocks &c., thereon; and desired that all his negroes and stocks in two other Counties, *be, the December after his decease, equally divided between his wife and only son, to be kept together and worked on his lands in those Counties*, and the profits thereof to be equally divided between his said wife and son. He devised to his son and his heirs, the last mentioned lands, (subject to the condition aforesaid,) during the life of his mother; and, after sundry small legacies to his other children, devised to his son all the residue of his estate not before disposed of. It was held that the wife was entitled to an absolute estate in a moiety of the slaves and stocks, and their increase, in the two counties last mentioned, together with a moiety of the profits made on the said lands the year the testator died; besides a moiety of the subsequent profits aforesaid. *Belling v. Robertson & wife*, p. 220-227.

6. In a devise of a plantation and the slaves upon it, to trustees for the support of a son of the testator; and of the wife and children of that son, by means of the profits thereof; *quare*, whether the testator's omitting to insert the names of the slaves, or to describe them in any other way than as slaves on the said tract of land, be such a circumstance as would subject them to the claims of creditors? *Gall & Garland v. Carter*, p. 245-250.

7. A testator gave certain parts of his estate to his two daughters, with a proviso, that, should either of them die "*without lawful issue*," her part should go "*to the other*." This was a good limitation over, in the event of the death of either, *without lawful issue living at the time of her death*. *James v. McWilliams & wife*, p. 301-302.

8. See POWERS; *Carrington's ex'ors v. Bell & wife*, p. 374-377.

9. See CONSTRUCTION OF WILLS; *Ibid.*

10. A testator having two brothers, devised to one of them a tract of land, describing it as his *plantation* on H. creek; and to the other the *plantation* whereon he lived, *and his lands thereunto belonging.*" This devise was construed as giving the last mentioned brother, not only the *plantation* or *cleared land* where the testator lived, with the adjoining woodland, used for timber and fuel, but the whole tract and several other tracts adjoining thereto. *Christian's devisee v. Christians*, p. 534-541.

DISMISSION.

1. Where the Bill in Chancery is defective, not only for want of proper parties, but in other respects, so that no decree for the plaintiff can be entered, a decree dismissing the Bill altogether, ought to be affirmed:—but, if it appear probable that something might be recovered upon a new bill properly drawn, such affirmance should be *without prejudice* to any other suit the plaintiff may be advised to bring. *Stott & others v. Baskerville & others*, p. 20-23.

2. In a *caveat* case, if it be found by the Jury, or agreed by the parties, that, since the institution of the *Caveat*, a Grant from the Commonwealth of the land in controversy, has been obtained by the *Caveatee*; judgment ought to be entered dismissing the *Caveat*; but such judgment to be no prejudice to any suit in Chancery which the *Caveator* may be advised to bring to vacate the said Grant, or any Grant that may issue to the *Caveatee* in consequence of such judgment of dismissal; the judgment on the *Caveat* being, in that event, not pronounced on a comparison of the respective rights of the parties. *Guerant v. Bagby*, p. 160-163.

3. A point similar to that in *Hough v. Shroove*, 4 *Munf* 490, again decided; viz, that a Bill of Injunction ought not to be dismissed at the next term after dissolution, under the 3d section of the Act of January 20th, 1804, if such Bill have other objects, besides those embraced by the Injunction. *Singleton v. Lewis & others*, p. 397-398.

4. A suit in Chancery, for *freedom*, being dismissed for want of prosecution; the decree was affirmed, without prejudice to any suit at law or in equity which the appellant might be advised to bring, pursuing the preliminary measures to prevent vexatious suits, prescribed by the Act of Assembly. *Ellis v. Baird & Baker*, p. 456-457.

DRAFTS.

1. The payee of a draft or order, reporting to be for money lodged by the drawer in the drawee's hands, belonging to such payee, may recover of the drawer upon the drawee's refusing payment; (timely notice of such refusal being given;) though such draft or order be not negotiable as a bill of exchange; being drawn on a particular fund, not in favour of the payee "*or order*,"—nor, in terms, for value received. *Jolliffe v. Higgins*, p. 3-6.

2. A guardian may bring *assumpsit* in his own name, upon a draft or order payable to himself as guardian, for money due to his ward. *Ibid*.

DRUNKENNESS.

1. A contract under seal, for valuable consideration, ought not to be avoided on the ground that a party was intoxicated at the time, if his assent was afterwards given when not disabled by intoxication or otherwise. *Arnold v. Hickman*, p. 15-18.

2. It seems, that intoxication is not a sufficient ground for vacating a party's assent to a contract, unless he was so drunk as to be incapable of business.—*Ibid*.

E.

EJECTMENT.

1. A verdict in Ejectment, finding for the plaintiff in general terms, a certain "*number of acres part of the premises in the declaration mentioned*," without designating the boundaries of such part, or referring to some certain standard to supply such defect, is too uncertain to warrant a Judgment upon it. *Gregory v. Jackson*, p. 25-27.

2. A special verdict in Ejectment, set aside, for not finding the *time* of the death of a person, under whom the lessors of the plaintiff might, or might not, have been entitled to the land in controversy; their title depending upon the time when he died, which, from the circumstances disclosed in the Verdict, *probably could have been found* by the Jury; also, for not finding whether the defendant, or those under whom he claimed, had, or had not, such possession of the land as would be sufficient for his defence, in that action, whatever

might be the state of the title. *Cropper v. Carlton & wife*, p. 277-280.

3. A *cestuy que trust*, after the purposes of the deed have been satisfied, may maintain ejectment, upon a demise in his own name, although the legal estate is still in the trustee. *Hopkins & Watson v. Ward*, p. 38-41.

4. A plaintiff in Ejectment may recover under one or the other, of two demises, of the same land, from different persons. *Ibid*.

5. Upon a judgment in ejectment, if execution of the Writ of *habere facias possessionem* be prevented for several years by Injunction, the plaintiff is entitled to the Writ, on motion, upon a rule to shew cause, without a *scire facias*; provided not more than a year has elapsed since the affirmance, by the Court of Appeals, of the Decree dissolving the Injunction and dismissing the bill in Chancery. *Noland v. Seckright, lessee of Cromwell*, p. 185-187.

5. In such case, if the term laid in the declaration has expired pending the proceedings on the Injunction, the Court to which the motion is made for the Writ of *habere facias possessionem*, may cause the term to be enlarged, and award the Writ, upon a rule to shew cause served upon the defendant. *Ibid*.

6. The heirs of a patentee of Land may recover in Ejectment, against a person who had the use and occupation of the land *as his own*, in the life time of the Patentee, and so continued until after his death; claiming to hold the same by *adverse* title; the duration of such possession having been less than twenty years. See *v. Greenlee*, p. 303-304.

7. In such case, if the heirs, being out of possession of the land, have executed a deed of bargain and sale of the same to a third person, such bargainee cannot recover in Ejectment; but the bargainors may. *Ibid*.

8. Three demises were laid in a declaration in Ejectment; one, from the patentee of the land, *who was dead*; another, from his *heirs*; and a third, from a person to whom they had executed a deed of bargain and sale. The plaintiff recovered on the *second* demise, though he could not on the first or third. *Ibid*.

9. It seems, that a plaintiff in Ejectment can not recover on a demise from a person *who is dead at the time of the action brought*. *Ibid*.

10. No verdict and judgment in *Ejectment*, can be relied on as a *bar* to a subsequent Ejectment, though for the same land, and between the same defendants and *lessors* of the plaintiffs; *the fictitious plaintiffs being not the same*. *Pollard v. Baylors & others*, p. 433-439.

EMANCIPATION.

1. A person, who has had possession of slaves more than five years, before the date of a deed of emancipation from another who previously was their owner, has a right, in opposition to their suit for freedom, to prove, by the acknowledgment of such owner, made *before execution of the deed*, or by any other legal evidence, that such possession of his was *adverse* to the claim of such owner; *but not by any such acknowledgment made thereafter*. *Groves & Reynolds v. Manne*, p. 191-202.

2. *Quere?* whether a deed of emancipation from a person having the right to slaves, of which another has *adverse* possession *at the time*, be competent to confer a right to freedom? *Ibid*.

3. A deed of emancipation can have no effect, if made by a person out of possession; another holding the slaves by a title *adverse* to his; and the possession of such other person having continued for five years before the execution of such deed. *Ibid*.

4. A deed of emancipation recorded in a *District Court*, is not so authenticated as to be lawful evidence in a suit for freedom. *Ibid*.

5. A testator, in the year 1790, bequeathed his slaves severally, to his children, with a proviso, "*that none of them be sold out of the families to whom devised, that, if offered for sale by any of them, out of the family of his wife, his daughter and sons, they be immediately liberated*."—A son of the testator, to whom a female slave was bequeathed, being in possession by virtue of the bequest, died intestate, and she came into the possession of a *grand-daughter*, by whose husband, a child of the said slave was sold to a *stranger*, to be carried out of Virginia. It was decided that a right to freedom did not accrue thereby. *Peggy & Mary v. Legg*, p. 229-231.

EMBLEMETS.

1. The provision contained in the 54th section of the Act concerning Wills,

&c. (R. Code of 1819, 1st Vol. p. 388,) which provides that the Emblements severed between the 1st of March and 31st of December in any year, shall be *assets* in the hands of the Executors, did not apply to the case of an estate for life held under a marriage contract dated in 1766; though the tenant for life died in 1801, and that section, (originally enacted in 1785,) took effect on the 1st of January 1787. *Thompson's adm'r v. Thompson's ex'or*, p. 514-519.

2. The common law gives to the executors of the tenant for life, such emblements, and such only, as were *seeded in his life time*. As to such crops as are put in *after his death*, the executors, (in a case where the common law rule governs,) should be charged a reasonable rent for the land, to be paid to the persons entitled in reversion or remainder, according to their several rights.—*Ibid*.

ENTRIES FOR LANDS.

1. In an action against the Surveyor of a County, for refusing to furnish Copies of certain surveys of lands which the plaintiff wished to enter as waste and unappropriated; the Court, on the plaintiff's motion, instructed the jury, "that, the surveys in question having been made in May 1774, the Land was liable to be entered as vacant land in December 1809, unless they were returned to the Land office; but that the plaintiff was not bound to shew that they were not returned to the Land Office in due time:"—and this instruction was not considered erroneous by the Court of Appeals. *Preston v. Bowen*, p. 271-277.

2. See PATENTS FOR LANDS; *Boyd & wife v. Hamilton's heirs*, p. 459-462.

EQUITY.

1. The majority of the Court were inclined to think that a surety is exonerated in equity, though not at law, by the plaintiff's accepting a confession of Judgment from the principal, and covenanting thereupon to grant him a stay of execution for a limited time; the surety not having assented to such new contract and compromise. *Ward v. Johnson*, p. 6-9.

2. The right of the assignee of a bond to demand payment thereof in a Court of Equity, which existed before the

Statute authorizing him to sue at law in his own name upon the assignment, is not impaired by that Statute; but the latter remedy is cumulative and additional to the former. *Winn v. Beales*, p. 23-25.

3. A creditor having obtained judgment against the executors of the surety for the debt, is not bound to take out execution, before he can file his Bill in Equity, for an account of the personal and real estate of the principal and surety, and to get satisfaction out of the real, in default of the personal, assets. *Duval's ex'or v. Tren's devisees*, p. 29-31.

4. Under what circumstances such Bill may be filed. *Ibid*.

5. Although a person, having a claim against a Mercantile Company, can net set off such claim against a debt from himself to one of the partners; yet it is competent for him to charge that partner, in equity, (in extinguishment of the said debt,) for so much of the surplus of the partnership property, as may be due to such partner on a settlement of the partnership accounts; for the purpose of which settlement, and also for that of ascertaining and adjusting his own claim against the company, all the partners should be made defendants to his Bill. *Dunbar v. Buck*, p. 34-36.

6. The clause in our Act of Assembly, (R Code of 1819, c. 128, § 83, p. 509,) which prescribes the sum for which judgment is to be rendered on a bond, meant that, in cases of penalties by way of security, the final justice of the case should be attained in the Courts of law, in effectuating which object, those Courts are to be governed by the same considerations which influence the Courts of Equity. *Waller v. Long*, p. 71-79.

7. A Court of Chancery ought not to give costs, against complainants, to parties erroneously made by its own direction. *Lewis & others v. Thornton & wife*, p. 87-98.

8. A suit in Chancery properly lies, against a defendant, who, claiming title under a deed alleged to be fraudulent, hath taken possession of, and converted to his own use sundry articles of personal property; the plaintiff praying the Court, to set aside such fraudulent deed, and compel the defendant to render a just account of the property so wrongfully taken, and to pay the value

thereof to the plaintiff. *Cocke v. Harrison*, p. 184-185.

9. A devisee of nearly all the estate of a principal debtor, gave a bond to indemnify the estate of the surety against the debt; in which bond one of the executors of the surety bound himself in his individual character, as surety for the said devisee. The creditor afterwards, obtained a judgment, in the *Federal Court*, against the said executors; one of whom, (viz. the same who was co-obligor in the bond of indemnity,) paid off the judgment. The said bond being in the possession of one of the obligees, who resided out of the State, and refused to let them have it, the Executors brought a suit in *Chancery* against the said devisee, (the plaintiffs and defendant being all citizens and residents of this State,) to recover of him the money so paid; and the Court's jurisdiction was sustained. *Cabell's ex'ors v. Megginson's adm'rs*, p. 202-207.

10. According to the practice in our Courts of Equity, it seems that a Bill, to set up a lost bond, need not be supported by the plaintiff's affidavit. *Ibid.*

11. The assignor and assignee of a bond being made defendants to a Bill exhibited by the obligor, for an Injunction and for general relief; he alleging that he paid the money to the assignor without notice of the assignment; if that allegation be afterwards disproved, whereupon the Injunction is dissolved, and the Bill dismissed as to the assignee; the cause ought yet to be retained and farther proceeded in, to give the complainant relief against the assignor. *Ruffners v. Barret*, p. 207-209.

12. Upon a Bill to foreclose a mortgage, against the mortgagor and a purchaser from him, the plaintiff filed an amended bill, stating that the latter, at the time of his purchase, received of the mortgagee a conveyance of sundry other lands; and praying a discovery thereof, and general relief; but without any special prayer that those lands be subjected to satisfy the plaintiff's claim. It appearing that the mortgage was not duly recorded, and the purchaser not chargeable with notice; a decree dismissing the Bill altogether, was affirmed; but without prejudice to the plaintiff's right to proceed against such other lands. *Rootes v. Holliday & Welch*, p. 251-261.

13. Upon a bill filed by an executor against the devisees and legatees, for settlement of his administration account, and for a decree compelling the devisees to convey a tract of land, sold by the plaintiff with their consent; it is error to decree, against the executor, a balance due upon his administration account, without directing such conveyance to be made by the devisees to the purchaser; notwithstanding such purchaser, being a defendant, failed to answer the bill; it appearing in evidence that he paid the purchase money, and the devisees, by their answers, having declared their willingness to make the conveyance. *Muchir's ex'or. v. Muchir's devisees*, p. 265-267.

14. A final decree, by default, may be set aside at a subsequent term, for good cause shewn, in a case where relief can not be given by bill of review, or bill to impeach the decree for fraud in obtaining it. *Erwin v. Vint*, p. 267-271.

15. In this case, the circumstances shewn were, that the defendant against whom the decree was rendered, was prevented by mistake and accident from filing his answer, and that, in fact, his title was good to the land in controversy. *Ibid.*

16. A contract for sale of land, rescinded in equity, on the ground that both parties were mistaken, as to the situation, and other circumstances materially affecting the value, of the land. *Chamberlayne & others v. Marsh's adm'rs* p. 283-287.

17. After dissolution of one Injunction, another was granted to the same judgment, and made perpetual, upon new matter, not known to the complainant before the first was dissolved; it appearing that the contract in question, though not tainted with fraud, was founded upon a mistake in relation to the existence of an important fact, of which both parties were ignorant. *Armstrong & wife v. Hickman*, p. 287-301.

18. Upon a Covenant to make a good title to certain lots of land, (according to a plat for extending the streets of a town,) including the use of the streets, and appurtenances therein mentioned, and that the covenantee, his heirs and assigns, may, at all times thereafter, enter into, possess and enjoy the said lots, with the streets, &c., without the let, hindrance or molestation of the Covenantor, his heirs and assigns; a Court

of Equity, by Injunction, will compel the covenantor, his heirs and assigns, to remove all obstructions by them put in the said streets, and open the same to the free and full use of the covenantor, his heirs and assigns, and to permit him and them ever thereafter to use the same, without let, hindrance or molestation. *Brooke v. Barton*, p. 306-307.

19. A person returned as appearance bail, who denies that he ever executed the bail bond, is not precluded from obtaining relief in equity, by his failing to appear and plead *non est factum* at law, after being informed that his name was subscribed to such bond; for if, in fact, he did not execute the bond, he had regularly no day in Court, and was therefore not bound to take any step for his relief in the action at common law. *Spotswood v. Higgenbotham*, p. 313-315.

20. In a case where the remedy at law was considered *doubtful* when the party applied to a court of Equity, it would be too strict to deny him admittance into that Court for relief. *Ibid.*

21. The officer who returned the writ and bail bond, ought, as well as the plaintiff at law, to be made a party defendant to a bill of Injunction filed by the person returned as bail, who denies that he ever executed the bond; for the officer is *interested* in the question in controversy, and should be a party, that *final and complete justice* may be done. *Ibid.*

22. In such case, in the same suit in Chancery, a decree may be rendered in favour of the plaintiff at law, (though defendant in equity,) against such officer, if justice should require it. *Ibid.*

23. The right of a *bona fide* assignee, for valuable consideration, of a note negotiable at the Bank of Virginia, to recover against the maker and indorsers of of such note, is not to be affected by any *equity*, of which he had no notice when he received it. *McNiel & Turner v. Baird*, p. 316-318.

24. A Court of Equity may decree in favour of *one defendant against another*, (in a case where the same decree operates in favour of the *Complainant*,) by subjecting, in the first instance, that defendant who ought *ultimately* to pay the debt. *Ibid.*

25. Where a testator empowers his *widow* to dispose of certain *slaves* "*among his children*," (in general

terms,) "*as she shall think proper*," she cannot give them *all to one*, nor *wholly exclude any*; nor can she give any of them to his *grand children*; and, if she make an appointment violating this principle, it will be avoided in Equity, and the property distributed among all the children and their representatives. *Hudson's v. Hudson's adm'r*, p. 352-357.

26. See FRAUD; *Taylor v. King*, p. 358-367.

27. See TRUSTS; *Ibid.*; and *Harris v. Harris*, p. 367-368.

28. See POWERS; *Carrington's ex'ors v. Bolt & wife*, p. 374-377.

29. Notwithstanding a judgment against administrators *as such*, in an action of debt, to which they pleaded "*payment by the intestate*," and a subsequent judgment, against them *personally*, in an action suggesting a *devastavit*, to which they pleaded "*no waste*," relief in equity was granted them, on the grounds that the peculiar and perplexed state of the assets, made it *difficult if not impracticable*, to plead in relation thereto at law, and that, at the trial of the second action, their principal counsel was absent, and their assistant counsel withdrew from the cause; in consequence whereof, they were wholly undefended, and a verdict, perhaps contrary to justice, was obtained against them, without any negligence or default on their part. *Pendleton's adm'r's v. Stuart and McCoull*, p. 377-384.

30. See WILLS; *Banks & others v. Booth*, p. 385-387.

31. If an official bond, given by a *Sheriff and his sureties*, before the Act of 1786, be so worded, as not to be *joint and several*, but *joint only*, a Court of Chancery is the proper tribunal to give the sureties relief, *against the estate of the Sheriff after his death*; upon their being compelled to pay a sum of money for a delinquency of such Sheriff in his lifetime. *Monmouth & Triplett v. Banks's ex'or & devisees*, p. 387-389.

32. See SPECIFIC PERFORMANCE; *Zane's devisees v. Zane*, p. 406-417.

33. Although the rule is, that the *allegata and probata* ought to correspond, yet the Court of Equity should always incline to get over *form* in favour of *substance*, where the case in *proof* is clearly such as would, if properly set forth in the Bill, entitle the plaintiff to a decree; especially if the defendants do not pretend to disprove the agree-

ment alleged, or to prove one different, but say in their answer that they are willing to yield to the proof of any agreement which the plaintiff can establish. *Ibid.*

34. Where a defendant, who had an adequate remedy at law, has been prevented from resorting to it, by a fraudulent representation or promise of the plaintiff, he ought to be relieved in equity. *Peindexter v. Waddy*, p. 418-422.

35. See INJUNCTIONS; *Ibid.*

36. See BILLS OF REVIEW; *Jones v. Pitcher's devisees*, p. 425-427.

37. See DEPOSITIONS; *Shumate v. Dunbar*, p. 430-431.

38. See EXHIBITS; *Ibid.*

39. It seems, that, where the annual rent of land descended, is more than sufficient to pay the interest accruing on a bond debt of the ancestor, a Court of Equity will not decree a sale of such land, in possession of his heirs, to satisfy the debt; the land being not subject to any specific lien, or incumbrance, in favour of the creditor. *Wilders v. Chamblis's adm'r & heirs*, p. 432-433.

40. See EVIDENCE; *Bumgardner & others v. Allen*, p. 439-447.

41. A plaintiff claiming an equitable title to a tract of land, against the heirs of a trustee, (in whom the legal title was by virtue of an ancient patent,) and against the heirs of a third person who have held possession for a long time by virtue of a patent of subsequent date, ought not to be denied the aid of a Court of Equity on the ground of his not producing the Entry, on which such ancient patent was founded; if it appear that the land in controversy was covered by that patent; as to which fact, if the testimony be doubtful, an issue ought to be directed, to be tried by a Jury. *Boyd & wife v. Hamilton's heirs* p. 459-462.

42. It seems, that a Bill in Equity properly lies to subject the estate of a secret partner in trade to the payment of a debt contracted by the ostensible members of the firm. *Cocke v. Upshaw & Prichett ex'or of Burnett*, p. 464-465.

43. In such case, if the fact of the secret partnership be doubtful on the testimony, the Court should direct an issue to ascertain it. *Ibid.*

44. In a Court of Equity, several mortgages, though appearing, upon their face, to be for distinct debts, will,

under circumstances, be considered as merely additional evidences of, and securities for, one original debt. *Anderson's adm'r v. Davies's adm'r*, p. 484-485.

45. *Quere*, whether it be regular, in a decree for sale of mortgaged premises, to direct the proceeds of such sale to be paid over to the plaintiff, before the sale shall have been confirmed by the Court? *Ibid.*

46. Under circumstances, inducing suspicions that a bond (on which a judgment at law had been obtained against an executor) was counterfeit or fraudulent; upon a Bill filed by the Executor, relief was given in equity, by directing an issue to try whether the bond in question was the deed of the testator or not; and, if so, what was the consideration on which it was founded; and this, notwithstanding the trial at law was upon the plea of payment put in by Counsel, and a new trial moved for by the Complainant was refused by the Court; it being alleged in the Bill that the complainant's suspicions of fraud were, for the first time, excited on the trial at law; and then, on a minute examination of the paper, he was convinced that the signature of his testator's name thereto was not genuine; which conviction was strengthened by other circumstances, some of which were known to him at the trial, and some afterwards. *West's ex'or v. Logwood*, p. 491-506.

47. See PARTIES; *Mayo v. Tomkies*, p. 520-528.

48. See MORTGAGES; *Ibid.*

49. The general principle laid down in the case of *Noland v. Cromwell*, 4 *Munf.* 155, does not apply to a case in which the rights of the parties can not be adjusted in the Court of Chancery, but the aid of a Court of Equity is necessary to give to each his proper share of the land, for which one has improperly obtained a Patent. *Christians's devisee v. Christians*, p. 534-541.

50. See PARTITION; *Ibid.*

51. In a suit in Chancery to recover a tract of land claimed by equitable title, and for other objects, if it appear that some of the defendants are entitled to a moiety of the land, by an equitable title adverse to that of the other defendants; the Court should permit them to unite as plaintiffs in the suit, to claim such moiety. *Ibid.*

52. A Creditor, by threatening to have execution levied, induced the debtor to allow him *fifteen per centum per annum* upon the debt, and to give a bond as principal obligor, in which the creditor joined as surety, payable at a future day, to a third person, to whom the amount was bona fide due, and who knew nothing of such usurious agreement. The debtor was entitled to no relief in equity against such innocent third person; not even by a decree to compel the Usurer to pay him the debt, in discharge of the complainant. *Stone v. Ware & Smith*, p. 541-560.

53. The usurious arrangement being proved; and the bill not exhibited for a discovery; the Court gave relief against the usurer, upon the terms of the debtor's paying him the principal justly due, with legal interest. *Ibid*.

54. See APPEALS; *Ibid*.

55. See SHERIFFS; *Tomkies' ex'or v. Drownman*, p. 557.

by false suggestions and misrepresentations by the plaintiff, "as per preamble in the said bond," and the plaintiff join issue as to the fact, which issue is found against him by a Jury; whatever estoppel (if any) might have been to such plea, is thereby waived and judgment ought to be for the defendant. *Chow ex'or of Wormeley v. Maffet & wife*, p. 120-123.

2. A defendant, being party or privy to a deed, can not avoid it, in a Court of common law, by parol evidence, on the ground of want of consideration; for he is estopped from averring such matter against a specialty. *Taylor v. King*, p. 358-367.

3. A purchaser from a person who has previously conveyed the estate to a trustee, by deed duly recorded, is estopped at law though not in equity, from impugning, on the ground of fraud, a deed regularly executed by the trustee, to a purchaser from him. *Ibid*.

ERROR.

1. Upon a *scire facias* against heirs and devisees, to revive a judgment in ejectment, if one of the defendants confess the plaintiff's right to revive the judgment in the *scire facias* mentioned; and thereupon, judgment be entered against him, that the plaintiff have execution for the whole tract of land in question; there is no error in such judgment of which he can take advantage. *Jones v. Doe lessee of Carter*, p. 105.

2. If, to a declaration, in debt, on a bond for making a title to a tract of land, the defendant plead "covenants performed" and a Verdict and judgment be rendered. (as in covenant,) for damages for non performance; saying nothing of the penalty of the bond; such judgment ought not to be reversed at the instance of the defendant; for such irregularity can not be injurious to him; because the true ground of the action appears by the declaration; and the satisfaction thereby demanded, extending to the whole injury, the action can in no form be repeated. *Pate v. Spotts*, p. 394-397.

ESTOPPEL.

1. In debt on a bond, if the defendant plead that the same was obtained

EVIDENCE.

1. In an action of slander, for charging the plaintiff with perjury in a judicial proceeding; the defendant, on the plea of not guilty, (though not permitted to prove the falsity of the words sworn by the plaintiff,) may prove what those words were, in mitigation of damages. *Grant v. Hoover*, p. 13-15.

2. A charge by a trustee, for articles sold, and cash lent, before the creation of the trust, ought not to be allowed, without proof thereof by disinterested testimony. *Beverly v. Miller*, p. 99-104.

3. It appears, from the decree in this case, that the points decided by Chancellor TAYLOR, concerning the evidence requisite to prove disbursements by a trustee in execution of the trust, and as to disbursements made without the consent of co-trustees, were affirmed by the Court of Appeals. *Ibid*.

4. In debt on a joint obligation, to which the defendants plead payment, they can not give in evidence a Covenant between one of the plaintiffs and one of the defendants, with parol testimony that the plaintiffs settled with that defendant, who was the principal debtor, and in such settlement kept their accounts separately; that each was entitled to one moiety of the debt; that the defendants gave notice that a dis-

count would be claimed by them on account of said covenant; and that the plaintiff who was party to the covenant, said that the same was not settled, and that he intended to allow a credit for it. *Arnold v. Jacksons*, p. 106-107.

5. Proof by one witness, that, on a certain day, in the time of the last sickness of the deceased, and at his habitation, he said it was his wish that a certain person should heir all his property; and, by a second witness, that on another day, during the same sickness, and at the same place, he heard the deceased speak the same words, and was told by him to take notice of what he said, is not sufficient to establish a nuncupative will, if the value of the personal property of the deceased exceed thirty dollars. *Weeden v. Bartlett & others*, p. 123-125.

6. A person, who has had possession of slaves more than five years before the date of a deed of emancipation from another who previously was their owner, has a right, in opposition to their suit for freedom, to prove by the acknowledgment of such owner, made before execution of the deed, or by any other legal evidence, that such possession of his was adverse to the claim of such owner; but not by any such acknowledgment made thereafter. *Givens v. Manns*, p. 191-202.

7. If a proprietor of slaves deliver them to another, who thereupon claims them, as sold; any declarations made by the former, not in the presence of the latter, and after such delivery of possession, are not admissible as evidence in opposition to such claim. *Ibid*.

8. A deed of emancipation recorded in a District Court, is not so authenticated as to be lawful evidence in a suit for freedom. *Givens v. Manns*, p. 191-202.

9. A Bill of sale of personal property, (not being necessary to pass the title,) need not be shewn in evidence by persons claiming under the grantee, in a controversy between them and the grantor, or those claiming under him; for they may prove, by any other legal evidence, a title in the person under whom they claim; and such grantee, or his representatives, may prove their title by other evidence than the Bill of sale, unless it be alleged that such Bill of sale contains other matter than the mere transfer of the property, (and of which the grantor, or those claiming un-

der him might avail themselves,) and notice be given to produce it: but in neither case can the substance or contents of the Bill of sale be given in evidence, without due affidavit by the party, or other satisfactory proof, of it's loss, or that it is not in the power of the party so offering the evidence. *Ibid*.

10. It seems, that a deposition taken *de bene esse*, by two magistrates, and with due notice, (it appearing that an order of Court was made awarding a commission to take it, and that the Clerk charged a fee for issuing the commission,) may be read as evidence; on proof of inability of the Witness to attend; notwithstanding there be no other proof that it was taken by virtue of a Commission delivered to the magistrates, (no commission being found among the papers,) and it be returned to the Clerk's office open and unsealed, but without being shewn to have been erased or altered. *Ibid*.

11. The deposition of a person under whom the party claims, in whose favour it is offered, is not admissible as evidence, unless it appear from the deeds that no recourse can be had against the witness in case of eviction; and this, though a release to the witness be executed by such party, before the deposition is read to the Jury, but after it was taken; and though, at a former trial of the cause, before the deposition was taken, a release was tendered, in the presence of the Court, by another person (under whom such party immediately claimed,) of all claim which such other person might have, in any event, against the witness, on account of the subject in controversy; the necessity of which release from that person was at that time agreed to be waived by the opposite party. *Woodward v. Woodson's heirs*, p. 227-229.

12. A patent, which is free from objection upon it's face, can not be impeached in a trial at law, upon any evidence, but that of a prior Patent remaining in full force. *Norvell v. Camm & Wife*, p. 233-245.

13. Evidence offered to the jury, and properly applying to the issue joined, ought not to be rejected on the ground of objections to the declaration. *Preston v. Bowen*, p. 271-277.

14. In a Court of common law, fraud may be given in evidence, to vacate a deed, on the plea of *non est factum*; if

such fraud relate to the execution of the instrument; as, if it be mis-read to the party, or his signature be obtained to an instrument which he did not intend to sign; but fraud committed in a settlement of accounts which preceded, or in a statement of facts which induced, its execution, can not be pleaded or given in evidence; the only remedy, in such cases, being in equity. *Taylor v. King*, p. 358-367.

15. In a suit against a Constable for breach of duty, in not delivering to the Sheriff, in obedience to the Court's order, attached effects in his hands, testimony on his part to prove that any of those effects were not the property of the person against whom the attachment issued, and, therefore, after being taken, were by him given up, is not admissible. *Smith (Lieutenant Governor) v. Cooper*, p. 401-405.

16. To such action, if the Constable plead, that the plaintiff in the attachment, having taken from a certain I. B. a bond for the delivery of the attached effects, afterwards directed him to give them up to the debtor, with which direction he complied; he can not introduce the said I. B. as a witness to prove it. *Ibid.*

17. Although the rule is, that the *allegata* and *probata* ought to correspond, yet the Court of Equity should always incline to get over form, in favour of substance, where the case in proof is clearly such as would, if properly set forth in the Bill, entitle the plaintiff to a decree; especially, if the defendants do not pretend to disprove the agreement alleged, or to prove one different, but say in their answer that they are willing to yield to the proof of any agreement which the plaintiff can establish. *Zane's devisees v. Zane*, p. 406-417.

18. Notwithstanding a clause of general warranty in a deed for land, a Court of Equity will receive parol testimony to prove that such clause was contrary to the actual agreement, by which the land was to have been conveyed with special warranty only; the written agreement of the vendor to make the conveyance, not being produced on the part of the vendee, to whom it was delivered. *Bumgardner & others v. Allen*, p. 439-447.

19. A motion for a new trial, on the ground that the verdict is contrary to evidence, ought to rest on the evidence actually given in at the trial, exclusive

of all other: especially, affidavits taken *ex parte*, ought not to be heard on such motion. *Street v. St. Clair*, p. 457-458.

20. In an action for words, proof of circumstances of suspicion, not amounting to full justification, is not admissible, in mitigation of damages, on the plea of not guilty. *McAlexander v. Harris*, p. 465-469.

21. Proof of parol declaration by the defendant, after the institution of the suit for slander, that he did not mean to charge the plaintiff with the crime alleged by the slanderous words, or that the words were spoken in heat of passion, is not admissible in his favour. *Ibid.*

22. The defendant in the action of slander, is not to be permitted to prove the general character of the plaintiff as an insulting, provoking and quarrelsome man; nor that, before the speaking of the slanderous words, the plaintiff was in the habit of vilifying, insulting and provoking, him and his family. *Ibid.*

23. In *assumpsit*, the testimony of witnesses, offered to prove the items in the plaintiff's account, ought not to be excluded from the Jury upon the ground that, in an action of debt between the same parties, (the record of which action is not exhibited,) determined during the pendency of the action of *assumpsit*, one of those witnesses was examined touching the same items claimed by the plaintiff, to repel or set off the credits then claimed by the defendant. *Robertson v. Depriest*, p. 469-470.

24. A charge of Usury being explicitly denied by the defendant's Answer, the plaintiff has not a right to an order requiring him to produce his books and papers, for the purpose of establishing such charge. *Greenhow's adm'r v. Harris*, p. 472-484.

25. In a Court of Equity, several mortgages, though appearing, upon their face, to be for distinct debts, will, under circumstances, be considered as merely additional evidences of, and securities for, one original debt. *Anderson's adm'r v. Davies's adm'r*, p. 484-486.

26. See BILLS OF EXCHANGE; *Walker v. Lavery & Gantley*, p. 487-488.

27. See PRESUMPTIONS; *Wells v. Washington's adm'r*, p. 532-533.

28. In general, a deed is to be taken as having been executed on the day of

it's date, unless it appear to have been on some other day. *Colquhoun v. Atkinson*, p. 550-557.

29. The testimony of the person who executed the deed, was received as fixing the time when it was executed; notwithstanding the testimony of two witnesses to his acknowledgment to the contrary *when not on oath*; he being entirely *disinterested* between the parties, and the falsehood of his evidence being *not probable* under the circumstances of the case. *Ibid.*

EXECUTIONS.

1. A motion for judgment on a forthcoming bond, in the obligatory part whereof no penal sum is mentioned, can not be sustained; but such bond, with the execution on which it was founded, may be quashed, on a motion for that purpose. *Bragg & others v. Murray*, p. 32.

2. *It seems*, that property conveyed, by deed of marriage settlement, in trust that the husband and wife shall be permitted, *during their joint lives*, to enjoy the profits, may be taken in execution to satisfy a debt, incurred *after* the marriage, for supplies furnished for the proper support of the husband and wife. *Scott & wife v. Lorraine & others*, p. 117-119.

3. If a *supersedeas* to a judgment, (execution being levied, and a forthcoming bond taken,) be issued before the day of sale, and thereupon the property be not forthcoming; the penalty of the bond is saved, and no motion lies upon it. *Rucker v. Harrison*, p. 181-184.

4. *It seems*, too, that, if the property taken in execution be in the sheriff's hands, at the time of his receiving the *supersedeas*, or be delivered to him on the day of sale, after his receiving such writ, he ought to restore it to the owner. *Ibid.*

5. An amended return, by a sheriff, upon an execution, stating that a writ of *supersedeas* was issued on a day specified; (being a day previous to that appointed for the sale of the property taken in execution;) that he thinks the said writ was delivered to him on the day of sale; and that the property for which a forthcoming bond was given, was not delivered at the day and place of sale; is sufficiently precise and certain. *Ibid.*

6. In a suit by the assignee against the assignor of a bond, if it appear that, after judgment against the obligor, a *fieri facias* was returned *nulla bona*; and that, afterwards, the assignee sued out a *Capias ad satisfaciendum*, upon which the return was, "executed on the body" of the defendant, who stands committed to the prison bounds, as per "bond, &c.;" the plaintiff can not recover, but must be considered as having brought his action prematurely; because, for aught that appears in the record, the obligor is still in custody under the *ca. sa.*, or may have paid the debt. *Johnston v. Mackley*, p. 448-450.

7. Not more than *one fine* can legally be imposed on the Sheriff, or other officer, for failing to return *one* execution. *Tomkins' Executor v. Downman*, p. 557.

8. The plaintiff at law having recovered, by successive judgments, *many fines*, against the Sheriff for failing to return *one* execution; to a greater amount, in all, than the execution itself, *with his extra costs added thereto*; it appearing, also, that the execution was lost, and therefore could not be returned; that the Sheriff's failing to make defence at law against any of the judgments after the first, proceeded from ignorance of the true construction of the Act of Assembly; and that, in relation thereto, there was a general delusion among the Citizens of the Commonwealth; the Court of Equity gave the Sheriff relief, by Injunction, prohibiting any farther recovery against him on account of his failure to return the said execution; and this, although it appeared he had received and applied to his own use a part, and probably the whole, of the money upon the execution. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

1. A settlement of an executor's administration account, certified by commissioners on a day subsequent to his death, and not appearing to have been made in his life time with notice to himself, nor, after his death, with notice to his executor, is erroneous, and ought not to be received as the ground of a decree against his estate. *Boyd ex'or of Haskins v. Kaufmans*, p. 45-47.

2. *Quere*, if an executor die indebted to the estate of his testator, without

any judgment or decree against him for the balance due; and his executor, *without notice of such debt*, apply the assets of his estate to the payment of debts of inferior dignity; is he guilty of a *devastavit*? *Ibid.*

3. It seems, that, where a decree against executors, for a legacy, is made upon their *confessing assets*, in their hands, sufficient to satisfy the same, (without specifying whether such assets consist of money or other property;) such decree may with propriety direct that they pay the legacy and interest, with the costs of the suit, *out of the said assets, if so much thereof they have*; if not, out of their own estates. *McRae's ex'ors v. Brooks & wife*, p. 157-159.

4. A decree against executors for a legacy, though made upon confession of assets, and without their expressly *demanding* bond and security from the plaintiff, is yet erroneous, if it do not require such bond and security to be given, before the defendants be compelled to pay the legacy. *Ibid.*

5. *Quere*, whether a suit against the Committee of an insane person, may not properly be revived against the administrators of such person, in the event of his dying during it's pendency? *Paradise's adm'rs v. Cole & Henderson*, p. 218-219.

6. See POWERS; *Carrington's ex'ors v. Bell & wife*, p. 374-377.

7. Notwithstanding a judgment against administrators *as such*, in an action of debt, to which they pleaded "*payment by the intestate*," and a subsequent judgment against them *personally*, in an action suggesting a *devastavit*, to which they pleaded "*no waste*," relief in equity was granted them, on the grounds that the peculiar and perplexed state of the assets made it *difficult, if not impracticable*, to plead in relation thereto at law, and that, at the trial of the second action, their principal Counsel was absent, and their assistant Counsel withdrew from the cause, in consequence whereof, they were wholly undefended, and a Verdict, perhaps contrary to justice, was obtained against them, without any negligence or default on their part. *Pendleton's adm'rs v. Stuart & McConill*, p. 377-384.

8. See FRAUD; *West's ex'or v. Logwood*, p. 491-506.

9. See SHERIFFS; *Thompson's adm'r v. Thompson's ex'or*, p. 514-519.

10. See EMBLEMENTS; *Ibid.*

11. It is not sufficient to make a person a party *as Executor*, and to call upon him to answer *as such*, if he be interested in the controversy *as a devisee*, or should be called upon to answer as to his *individual* interest or transactions.—*Mayo v. Tomkies*, p. 520-528.

12. Where lands devised to be sold, have been sold by *one of several* executors, *all the executors* ought to be parties to a suit to foreclose a mortgage previously existing on those lands. *Ibid.*

EXHIBITS.

See DECREES; *Shumate v. Dunbar*, p. 430-431.

F.

FATHER AND CHILD.

1. Trespass *on the case* may properly be brought by a father, for loss of the service of his daughter, and expenses incurred by him in consequence of her being debauched and got with child; *as forcible injury* to himself or his property being alledged in the declaration. *Parker v. Elliott*, p. 587-589.

2. What is the proper form of the declaration in such case *Ibid.*

3. It is not error that, in such case, the Court refuse to instruct the Jury that, if, upon the whole evidence, it shall appear to them that the father, in the intercourse between the defendant and his daughter, (who was of full age,) did not act with the caution of a man of ordinary prudence, they ought to find *for the defendant*; but do instruct the Jury that, if the conduct of the plaintiff shall appear to have been *indiscrete*, that is a circumstance which should *mitigate the damages*. *Ibid.*

FICTION OF LAW.

1. Actions may be brought in the Courts of *this State*, upon contracts entered into, or *personal injuries* committed, *any where*. In general, it is not necessary to state in the declaration, *where* the contract arose, or the injury was committed:—but this is sometimes necessary; and, then, (for the sake of obviating the objection of a variance, or the like,) the plaintiff is permitted to state, by a fiction, under a *videlicet*, that the place is within the jurisdiction of the Court in which the suit is brought;

which fiction, being in furtherance of justice, can not be traversed. *Shaver v. White & Dougherty*, p. 110-114.

2. In cases in which the plaintiff does not use this fiction, the defendant is not, in general, permitted to aver that the cause of action arose in another Country, unless he wishes to justify the act by the laws of that Country; or to shew, thereby, that he is not responsible in the particular form of action in question; in which cases, the locality of the act forms an essential part of his defence; but such plea does not go to the jurisdiction of the Court, but only to the justification of the defendant. *Ibid*.

FINES.

1. Not more than *one fine* can legally be imposed on the Sheriff, or other officer, for failing to return *one* execution. *Tomkies' Executor v. Downman*, p. 557-573.

2. See *SHERRIS*; *Ibid*.

FORFEITURES.

1. If a petitioner for land forfeited by non payment of quit rents, under the 30th section of the Act of 1748, c. 1., failed to pay the consideration money, within six months after a Judgment in his favour, and to get a Patent as the law required; whereupon, another person obtained a Patent for the same land *by virtue of a treasury land warrant*; such Patent is good *at law*, against a title derived from such Petitioner, unless the length of possession, of the tenant and those under whom he claims, accruing before the issuing of such patent, be such as is sufficient to bar a *writ of right*. *Norvell v. Camm & wife*, p. 233-245.

2. *Quere*, whether the tenant in such case could be relieved in equity? *Ibid*.

3. *Quere*, also, whether the issuing of such patent could be prevented by a *Caveat*, on the ground that the land, having been previously granted and settled, though forfeited by the original patentee for non payment of quit rents, was not waste and unappropriated? *Ibid*.

FORTHCOMING BONDS.

1. A motion for judgment on a forthcoming Bond, in the obligatory part whereof no penal sum is mentioned, can not be sustained; but such bond, with the execution on which it was founded, may be quashed, on a motion

for that purpose. *Bragg & others v. Murray*, p. 32.

2. If a *superedeas* to a Judgment, (execution being levied, and forthcoming bond being taken,) be issued before the day of sale; and thereupon the property be not forthcoming; the penalty of the bond is saved, and no motion lies upon it. *Rucker v. Harrison*, p. 181-184.

FRAUD.

1. The ground on which an original purchaser, *with notice*, is postponed in equity, is, that the taking the legal estate, after notice of a prior purchase or equity, makes the party a *mala fide* purchaser, and amounts to a *fraud*. In order to fix this fraud, however, the proof of notice must be clear. If it be merely doubtful, a presumption of fraud will not take place. *Curtis v. Lunn ex'or of Jones*, p. 42-45.

2. In debt on a bond, if the defendant plead that the same was obtained by false suggestions and misrepresentations by the plaintiff, "*as per preamble to the said bond*," and the plaintiff join *issue as to the fact*, which issue is found against him by a jury; whatever estoppel (if any) might have been to such plea, is thereby waived, and judgment ought to be for the defendant. *Chew ex'or of Wormeley v. Moffett & wife*, p. 120-123.

3. Issue being joined on a plea that a bond was obtained by fraud, a verdict, "for the defendant, because the Jury *believe* the bond was obtained by *fraudulent means*," is sufficiently positive and certain. *Ibid*.

4. A suit in *Chancery* properly lies, against a defendant, who, claiming title under a deed alledged to be *fraudulent*, hath taken possession of, and converted to his own use sundry articles of personal property; the plaintiff praying the Court, to *set aside such fraudulent deed*, and compel the defendant to render a just account of the property so wrongfully taken, and to pay the value thereof to the plaintiff. *Cocke v. Harrison*, p. 184-185.

5. A special action on the case lies against the surveyor of a County for *fraudulently refusing* to furnish copies of surveys, when lawfully demanded, and thereby enabling a third person to locate the lands, therein described, before the plaintiff. *Preston v. Bowen*, p. 271-277.

6. In a court of common law, fraud may be given in evidence, to vacate a deed, on the plea of *non est factum*; if such fraud relate to the execution of the instrument; as, if it be mis-read to the party, or his signature be obtained to an instrument which he did not intend to sign; but fraud committed in a settlement of accounts which preceded, or in a statement of facts which induced, its execution, can not be pleaded or given in evidence; the only remedy, in such cases, being in equity. *Taylor v. King*, p. 358-367.

7. A purchaser from a person, who has previously conveyed the estate to a trustee, by deed duly recorded, is estopped at law, though not in equity, from impugning, on the ground of fraud, a deed regularly executed by the trustee to a purchaser from him. *Ibid*.

8. Where a defendant, who had an adequate remedy at law, has been prevented from resorting to it, by a fraudulent representation or promise of the plaintiff, he ought to be relieved in equity. *Potndexter v. Waddy*, p. 418-422.

9. Under circumstances inducing suspicions that a bond (on which a judgment at law had been obtained against an executor,) was counterfeit, or fraudulent; upon a bill filed by the executor, relief was given in equity, by directing an issue to try whether the bond in question was the deed of the testator, or not; and, if so, what was the consideration on which it was founded: and this, notwithstanding the trial at law was upon the plea of payment put in by Counsel, and a new trial moved for by the Complainant was refused by the Court; it being alleged in the Bill that the Complainant's suspicions of fraud were, for the first time, excited on the trial at law, and then, on a minute examination of the paper, he was convinced that the signature of his testator's name thereto was not genuine; which conviction was strengthened by other circumstances, some of which were known to him before the trial, and some afterwards. *Went's executor v. Logwood*, p. 491-506.

10. See HUSBAND AND WIFE; *Prior & others v. Kinney's ex'ors*, p. 510-514.

FREEDOM. (action for)

1. In the case of slaves brought into this State, from any of the United States,

before the Act of 1793, the fact of the master's having taken the oath required by law, within ten days after removal, should be presumed from twenty years possession of them, as slaves, without their claiming freedom; so that, in such case, the *onus probandi* in the suit for freedom should be thrown on the plaintiffs; but this presumption may be repelled by circumstances. *Abraham & others v. Matthews*, p. 159.

2. Infancy of any of the slaves is not conclusive against the presumption; but a circumstance to be considered, the weight and effect of which should be left to the Jury. *Ibid*.

3. A deed of emancipation recorded in a District Court, is not so authenticated as to be lawful evidence in a suit for freedom. *Givens v. Manna*, p. 191-202.

4. A suit in Chancery for freedom, being dismissed for want of prosecution; the decree was affirmed, without prejudice to any suit at law or in equity which the appellant might be advised to bring, pursuing the preliminary measures, to prevent vexatious suits, prescribed by the Act of Assembly. *Ellis v. Baird & Baker*, p. 456-457.

FREIGHT.

1. A shipper of corn having agreed to deliver it on board with no *wareasonable delay*; the Captain of the vessel applied for it on Sunday, and, no person being ready to deliver it, would not wait 'till Monday, but went to sea without it. The ship owner was not entitled to *dead freight* on the quantity not shipped; but, on the contrary, was bound to make compensation to the other party, for the loss sustained in consequence of the Captain's not taking the full quantity on board. *Dunbar v. Buck*, p. 34-36.

GIFTS.

1. See LIMITATIONS OF ESTATES; *Self's adm'r v. Tune*, p. 470-472.

2. See HUSBAND AND WIFE; *Smith v. Smith's adm'rs*, p. 582-584.

GUARDIAN AND WARD.

1. A guardian may bring *assumpsit*, in his own name, upon a draft or order payable to himself as guardian, for money due to his ward. *Jelliffe v. Higgins*, p. 3-6.

2. If a suit against an infant in the Superior Court of Chancery, be fully defended by his guardian appointed by the County Court, whose answer is received on his behalf, under the sanction and authority of the Superior Court; he must be equally bound by such defence, as if such guardian had been, in form, appointed guardian *ad litem*: but if the suit abate as to such guardian by his death, before the decree, a guardian *ad litem* ought to be appointed, notwithstanding all the testimony and accounts were taken before his death. *Beverly v. Miller*, p. 99-104.

3. A demurrer to a bill in Chancery against a guardian, for advance of money, &c. by the plaintiff for the use of the Ward, ought not to be sustained on the ground that the Ward ought to have been a party; but if, upon the answer of the Guardian, it should appear proper, the Court should then direct the Ward to be made a party. *Sutton v. Gatewood & Wife*, p. 398-399.

H.

HEIRS.

1. The heirs of a Patentee of Land may recover in Ejectment, against a person who had the use and occupation of the land, *as his own*, in the life time of the Patentee, and so continued until after his death; claiming to hold the same by *adverse* title; the duration of such possession having been less than thirty years. See *v. Greenlee*, p. 303-304.

2. In such case, if the heirs, being out of possession of the land, have executed a deed of bargain and sale of the same to a third person, such bargainee can not recover in Ejectment; but the bargainors may. *Ibid*.

3. Three demises were laid in a declaration in Ejectment; one from the patentee of the land, *who was dead*, another, from his heirs; and a third, from a person to whom they had executed a deed of bargain and sale. The plaintiff recovered on the second demise; though he could not on the first, or third. *Ibid*.

4. See *SKISIN; Dickenson & others v. Holloway*, p. 422-425; and *Blankenbaker v. Blankenbaker*, p. 427-428.

5. It seems, that, where the annual rent of land descended is more than sufficient to pay the interest accruing

on a bond debt of the ancestor, a Court of Equity will not decree a sale of such land, in possession of his heirs, to satisfy the debt; the land being not subject to any *specific lien*, or incumbrance, in favour of the creditor. *Wilders v. Chamblis's adm'r & heirs*, p. 432-435.

HUSBAND AND WIFE.

1. A parol agreement between husband and wife that, in consideration of her joining him in a conveyance of a parcel of her lands, he would purchase certain other lands, build thereon, and convey the same to her, being clearly proved, and partly executed, by her joining in the deed, and his making the purchase and erecting the buildings, ought to be enforced in equity against his heirs; notwithstanding a great disparity in value between the lands so bought and sold; it appearing that, at the time of the marriage, the husband was very poor, and that all the real property in his possession, (except the land purchased as aforesaid) was held in right of the wife. *Gosden & wife v. Tucker's heirs*, p. 1-3.

2. A plaintiff suing for slaves as administrator of his wife, is not barred by a decision against him in her lifetime, in a suit to which she was not a party; the ground of that decision being that, under the act of limitations, the opposite party had obtained a legal title to the slaves by five years possession commencing *during the coverture*; during which, also, the right of the wife accrued; and the husband having never had possession *in his character as husband*. *Blakey v. Newby's adm'r*, p. 64-71.

3. If slaves specifically bequeathed, be in the possession of a person who is at the same time executor of the testator and husband of a legatee, such possession will enure to him in the character of *executor only*, unless there be some election, or some act indicative of an intention, to take in the character of *husband*; especially, where the bequest is to several legatees jointly, and no division among them has taken place. *Ibid*.

4. A plaintiff in *assumpsit* is entitled to recover upon a parol agreement of the defendant, that, *if the plaintiff would furnish and supply a certain married woman and her infant children with board, washing and lodging for a cer-*

tain time, the defendant would pay him for it; averring and proving that he furnished the board, washing and lodging accordingly: and this, although the woman's husband be in the Commonwealth at the time, and bound to furnish her and the children with necessities; and the defendant be not morally or legally bound, but by his said promise. *Lanier v. Harwell*, p. 79-81.

5. Where the personal property of the wife is so settled, by a deed executed before the marriage, and duly recorded, that, upon her dying intestate in her husband's lifetime, the trustee is to convey the same to her legal heirs; her nearest blood relation is, in such event, entitled to the administration of her estate, in preference to her husband. *Bray v. Dudgeon*, p. 132-133.

6. An agreement was made between two unmarried sisters, that the property of the one who should die first, or be first married, should, in either event, belong to the other; in consideration of which agreement, one of them, by a deed of gift executed two days before her marriage, conveyed all her slaves to her said sister, who, after the marriage, lived partly with her, and partly with her brother; permitting the husband, (who was in embarrassed circumstances,) to have the use of the slaves; except two, whom the donee retained in her own immediate employment, and principally to wait upon herself. This deed, though admitted to record on the oath of one of the subscribing witnesses, only, who also swore to the hand-writing of another, who was dead, was adjudged not to be fraudulent as to the creditors of the husband; notwithstanding a judgment for a debt had been rendered against him, and was unsatisfied, when it was executed, and when the marriage was solemnized. *Prior & others v. Kinney's ex'ors*, p. 510-514.

7. A deed of gift of slaves to a married woman, "to her own special use, and afterwards to her heir or heirs;" with a clause providing that, "if she shall die without heir or heirs, or without a Will disposing of the said slaves and their increase, they shall return to the donor or his heirs;" conveys the property to the separate use of the wife, so that, after the death of the husband, she is entitled to hold the slaves and their increase, against his administrators. *Smith v. Smith's adm'rs*, p. 582-584.

I.

IMMATERIAL ISSUE.

1. In trespass for destroying a mill-dam, if the defendants plead that the said dam was unlawfully erected by the plaintiff in a ford where a public road crossed the stream, whereby the said road and ford were obstructed, to the great damage and nuisance of the citizens of the Commonwealth; and that the defendants, in order to abate the said nuisance, peaceably cut down and removed a part of the said dam; and the plaintiff reply, that he did not, by erecting the said dam, entirely obstruct the said public road and ford, and that the citizens of this Commonwealth were not altogether prevented from passing the same; whereupon issue be joined; such issue is immaterial, and, after a verdict for the plaintiff, ought to be set aside, and a repleader directed. *Dimmett & others v. Eskridge*, p. 308-311.

INCUMBRANCES.

1. In this case, a general charge upon the estate of a testator, for the payment of legacies, in aid of a particular fund provided for that purpose, was not enforced against bona fide purchasers of the lands, after a great lapse of time; because it might admit of a doubt whether, by the terms of the Will, the charge was upon the land itself, or only upon the profits thereof; because the lands might be presumed to be exonerated by requisition of security from the devisees, for payment of the legacies; and, above all, because the testator left a personal estate abundantly sufficient for that purpose, which estate was wasted by the executors. *Lewis and others v. Thornton and wife*, p. 87-98.

INDORSEMENTS.

1. See ATTORNEYS IN FACT; *Munn v. King*, p. 428-430.

INFANTS.

1. If a suit against an infant in the Superior Court of Chancery, be fully defended by his guardian appointed by the Court, whose answer is received on his behalf, under the sanction and authority of the Superior Court; he most

be equally bound by such defence, as if such guardian had been, in form, appointed guardian *ad litem*; but, if the suit abate as to such guardian, by his death, before the decree, a guardian *ad litem* ought to be appointed, notwithstanding all the testimony and accounts were taken before his death. *Bevellys v. Miller*, p. 99-104.

2. An action for an assault and battery, committed upon an infant, ought not to be brought in the name of the guardian of such infant, but in the name of such infant by his or her guardian, or next friend: and error in this respect, before January 1st 1820, was fatal, even after general verdict for the plaintiff. *Stewart v. Crabbin's guardian*, p. 280.

3. Under the 5th section of the Act of Descents of 1792, where an infant died without issue, having title to certain real estate derived by descent immediately from the father, leaving no relation in the paternal line, but a Grandmother and Uncle; the grandmother was not entitled to inherit any part of such estate, but the paternal line was entitled to the whole. *Ligon v. Fuqua & wife*, p. 281-282.

4. A possession of slaves commencing during the infancy of a plaintiff, can not operate a title in favour of a defendant, until it has continued five years after such infancy has ceased. *Hudsons v. Hudson's adm'r*, p. 352-357.

5. When the act of limitations once begins to run, it runs over all *mones* acts, such as coverture, infancy, &c. *Ibid*.

6. Although infants are bound by judgments had under the superintendence and protection of the Court; yet, where the case is referred to arbitrators, whereby they are deprived of that protection, a submission, even by rule of Court, ought not to be sanctioned; even though the award be in their favour. For, as awards are in the nature of judgments, and are to be final and conclusive, which cannot be where one of the parties has a right to avoid them; it follows that a submission by infants, (although with adults,) can not be obligatory on either party. *Britton v. Williams's devisees*, p. 453-454.

INJUNCTIONS.

1. In an action upon a Bond for prosecuting an Injunction, to stay proceedings on a judgment at law for a debt

bearing interest; which Injunction is dissolved and the bill dismissed; the plaintiff is entitled to a verdict for the amount of the principal sum, with lawful interest to the time of finding such verdict, the costs at law and in Chancery, (costs being awarded to the plaintiff by the decree,) with damages on the said principal sum, at the rate of ten per centum per annum, during the pendency of the injunction; although the condition of the bond be, for payment of "the judgment, and costs of the" injunction (if ruled to be paid by the "complainant;") without mentioning interest or damages. *For & Venlos v. Mountjoy*, p. 36-37.

2. Upon a judgment in Ejectment, if execution of the Writ of *habeas facias possessionem* be prevented for several years by Injunction, the plaintiff is entitled to the Writ, on motion, upon a rule to shew cause, without a *scire facias*; provided not more than a year has elapsed since the affirmance, by the Court of Appeals, of the decree dissolving the Injunction and dismissing the Bill in Chancery. *Noland v. Seekright lessee of Cromwell*, p. 185-187.

3. The assignor and assignee of a bond being made defendants to a bill exhibited by the obligor, for an Injunction and for general relief; he alleging that he paid the money to the assignor without notice of the assignment; if that allegation be afterwards disproved, whereupon the injunction is dissolved, and the Bill dismissed as to the assignee; the cause ought yet to be retained and farther proceeded in, to give the complainant relief against the assignor. *Ruffners v. Barret*, p. 207-209.

4. If the powers of trustees suing in Chancery be vacated, pending the suit, upon a bill filed against them by a cestuy que trust; and other trustees be appointed; it seems, that the Court may change the plaintiffs after answer filed, upon terms, of the new trustees' paying the costs already incurred, and giving security for future costs; but it can not vacate an injunction bond given by the original trustees, and direct another to be executed, without previous notice to the defendants, that they may shew cause against the motion. *Galt & Garland v. Carter*, p. 245-250.

5. After dissolution of one Injunction, another was granted to the same judgment, and made perpetual, upon new

matter, not known to the Complainant before the first was dissolved; it appearing that the contract in question, though not tainted with fraud, was founded upon a mistake, in relation to the existence of an important fact, of which both parties were ignorant. *Armstrong & wife, v. Hickman*, p. 287-301.

6. Upon a Covenant to make a good title to certain lots of land, (according to a plat for extending the streets of a town,) including the use of the streets, and appurtenances therein mentioned, and that the Covenantee, his heirs and assigns, may, at all times thereafter, enter into, possess and enjoy the said lots, with the streets, &c., without let, hindrance or molestation of the covenantor, his heirs and assigns; a Court of Equity, by Injunction, will compel the covenantor, his heirs and assigns, to remove all obstructions by them put in the said streets, and open the same to the free and full use of the covenantee, his heirs and assigns: and to permit him and them ever thereafter to use the same, without let, hindrance or molestation. *Brooke v. Barton*, p. 306-307.

7. If the maker of a Note negotiable at the Bank of Virginia, file a Bill of injunction against the payee and his assignee, on the ground of an equity affecting the payee only; the Court of Chancery, having before it all the parties concerned, ought not to discharge the maker altogether, nor to turn over the assignee to a suit at law against the payee; but should decree against the latter, in the first instance, that he pay the amount of the note to the assignee, and the costs at law; and liberty should be reserved to the assignee to apply to the Court to dissolve the injunction as to the maker, for so much of the said debt as he may not be able to recover from the payee; in which case, a decree ought also to be rendered in favour of the maker against the said payee, for so much thereof as he may be compelled to pay as aforesaid. And the decree should farther direct, that the action at law in favour of the assignee against the payee, if any be pending, be perpetually enjoined, except as to the costs. *McNiel & Turner v. Baird*, p. 316-318.

8. In such case, the payee should pay to both the other parties, their Costs in Chancery and in the Court of Appeals, upon an appeal taken by himself and

the assignee, in the decision of which both the other parties substantially prevail. *Ibid.*

9. A point similar to that in *Hough v. Shreeve*, 4 *Munf* 490, again decided; viz, that a bill of injunction ought not to be dismissed at the next term after dissolution, under the 3d sect. of the Act of January 20th 1804, if such Bill have other objects besides those embraced by the injunction. *Singleton v. Lewis & others*, p. 397-398.

10. Upon a bill of Injunction to a judgment at law; if it appear that the complainant, as to whom the injunction is made perpetual, was forced to give a forthcoming bond; and that there is no equity in favour of another defendant to the suit at law, on whom the execution was not served; the Court should so extend the decree as to enjoin that defendant from availing himself of the return of the execution and forthcoming bond, to prevent proceedings against him upon the judgment. *Poindexter v. Waddy*, p. 418-423.

11. See *Usury*; *Greenhow's adm'r v. Harris*, p. 472-484.

12. See *Sherriffs*; *Tombles' ex'or v. Downman*, p. 557-573.

INSANE PERSONS.

1. *Quere*, whether a suit against the Committee of an insane person, may not properly be revived against the administrators of such person, in the event of his dying during it's pendency? *Paradise's adm'r v. Cole & Henderson*, p. 218-219.

INSOLVENCY.

1. It is generally necessary for the assignee of a promissory note to sue the drawer, in order to charge the indorser; but to this rule there are exceptions; where the plaintiff can shew a discharge of the drawer under the former bankrupt laws of the United States, or the insolvent law of this State, or that the drawer was actually insolvent, so that a suit would have been wholly unavailing. *Brown v. Ross*, p. 391-393.

INSTRUCTIONS TO JURIES.

1. It is not error for the Court to refuse to instruct the Jury, after being

sworn, and before evidence introduced, to render a special verdict. *Woodward v. Woodson's heirs*, p. 227-229.

2. In an action against the surveyor of a County, for refusing to furnish copies of certain surveys of lands which the plaintiff wished to enter as waste and unappropriated; the Court, on the plaintiff's motion, instructed the jury, "that, 'the surveys in question having been made in May 1774, the land was liable to be entered as vacant land in December 1809, unless they were returned to the land office; but that the plaintiff was not bound to shew that they were not returned to the land office in due time;' and this instruction was not considered erroneous by the Court of appeals. *Preston v. Bowen*, p. 271-277.

3. In debt on a promissory note, the Court, if requested, ought to instruct the Jury that, twenty years having elapsed between the time when the note became due and the instituting of the suit, they ought to presume it paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest, or part payment of principal, within the twenty years. Nor can the Court be justified in refusing to give such instruction, on the ground that the defendant, in his application, has not stated the evidence given in the cause; or that, in the Court's opinion, the said principle of law does not apply to the case, under the circumstances appearing in proof; for this would be undertaking to judge of the weight of evidence, of which the Jury are the proper judges. *Wells v. Washington's adm'r*, p. 532-533.

4. In an action brought by a father for loss of the service of his daughter &c., in consequence of her being debauched, it is not error that the Court refuse to instruct the Jury, that, if, upon the whole evidence, it shall appear to them, that the father, in the intercourse between the defendant and his daughter, (who was of full age,) did not act with the caution of a man of ordinary prudence. they ought to find for the defendant; but do instruct the Jury that, if the conduct of the plaintiff shall appear to have been indiscrete, that is a circumstance which should mitigate the damages. *Parker v. Elliot*, p. 587-589.

INTEREST.

1. If a bond be given in the usual form, with a penalty, conditioned to be discharged by payment of the principal at a future day, "with interest from the date if not punctually paid," such *back* interest is to be considered an additional penalty, and not recoverable. *Waller v. Long*, p. 71-79.

2 Under the particular circumstances of this case, no interest was permitted to be charged against a trustee on the monies from time to time in his hands; and no commissions were allowed him for his trouble; but, on closing his accounts, interest was allowed on a balance in his favour. *Beverleys v. Miller*, p. 99-104.

3. In debt on a bill penal, a judgment, entered upon *nil dicit* or *non sum informatus*, ought not to be reversed on the ground that the declaration, though describing the bill penal correctly as to the principal sum, penalty and date, omits to mention that the debt is payable "with interest from a day prior to the date; and that the judgment, in conformity with the bill penal, is entered, for the penalty, to be discharged by the principal, with such interest, and costs. *Harper v. Smith*, p. 389-390.

4. See ATTACHEMENTS; *Smith v. Pearce*, p. 585-587.

ISSUES.

1. Issues being joined on the pleas of *ne such record*, and the Act of Limitations; if the Jury find for the plaintiff on the second plea, and the Court, without taking any notice of the first plea, enter judgment; such judgment ought to be reversed; notwithstanding, on previous pleadings, (which by consent were set aside,) the Court had pronounced that, in fact, there was such a record. *Gee v. Hamilton & wife*, p. 32-33.

ISSUES OUT OF CHANCERY.

1. Upon a Bill of Injunction to prevent the sale, under execution, of slaves devised in trust, if the defendants alledge that the *cestui que trust* was entitled to the slaves by five years possession before the death of the devisor;

and the truth of such allegation be *doubtful* on the evidence, the Chancellor ought to direct an issue to ascertain that fact. *Galt and Garland v. Carter*, p. 245—250.

2. Notwithstanding a paper purporting to be a Will, be proved, in a suit in Chancery, to have been wholly written and subscribed by the supposed testator; yet if, upon the evidence, (there being no attesting witness,) it be *doubtful* whether, at the time he wrote it, he was in a proper state of mind to make a testament; whether it was seriously intended by him as such; or, if so, whether it has not been subsequently nullified by the re-publication of a former Will, a revocation of it, or otherwise; the Court ought to direct *issues* to ascertain such facts, before any decision of the cause. *Banks and others v. Booth*, p. 385—387.

J.

JEOFAILS.

1. A declaration in behalf of a Mercantile Company, by the name of the *firm*, (without mentioning the names of the *partners*,) is good after a verdict for the plaintiffs upon the general issue. *Pate v. Bacon & Co.* p. 219—220.

2. If the declaration in detinue do not contain a demand, "that the defendant *render* to the plaintiff," the property sued for; yet, after verdict on the plea of *non detinet*, judgment ought not to be arrested. *Bogges v. Bogges*, p. 486—487.

JOINT OBLIGATIONS.

1. In debt on a *joint* obligation, to which the defendants plead payment, they cannot give in evidence a Covenant between *one* of the plaintiffs and *one* of the defendants, with parol testimony, that the plaintiffs settled with that defendant, who was the *principal* debtor, and in such settlement kept their accounts separately; that each was entitled to one moiety of the debt; that the defendants gave notice that a discount would be claimed by them on account of said covenant; and that the plaintiff who was party to the covenant, said that the same was not settled, and that he intended to allow a credit for it. *Arnolds v. Jacksons*, p. 106—107.

JUDGMENTS.

1. After a Judgment in detinue, a new action of detinue against the same defendant for the same thing, in which the former judgment is not declared upon, but is only relied on as evidence of title, can not be maintained. *Withers's executrix v. Withers's executor*, p. 10—12.

2. *Quere*, whether any action other than a *scire facias*, can be maintained upon a Judgment in detinue? *Ibid.*

3. If a judgment of a County Court be assigned, and afterwards reversed by the Superior Court of law, the assignee may thereupon sue the assignor, without carrying the case to the Court of Appeals. *Arnold v. Hickman*, p. 15—18.

4. *Assumpsit* may be brought against the assignor of a Judgment, afterwards reversed, notwithstanding the assignment was by a *sealed instrument*; for, in such case, the sealed instrument is not the *ground* of the action but only *inducement* thereto. *Ibid.*

5. The right to issue a *scire facias* upon a Judgment, is not barred by the Act of Limitations in a case where execution was issued in due time, and returned no effects, though more than ten years elapsed between the return of the execution, and date of the *scire facias*. *Gee v. Hamilton and wife*, p. 32—33.

6. *It seems*, that a verdict for a certain sum of money, with interest from a day specified, "subject to a credit," (without saying on what day such credit is to be applied,) is not so uncertain as that the plaintiff cannot take judgment upon it. *Lanier v. Harwell*, p. 79—81.

7. A judgment, in such case, "for the damages aforesaid in form aforesaid assessed," sufficiently follows the verdict. *Ibid.*

8. Upon a *scire facias* to revive a judgment, in debt for a penal sum, to be discharged by principal and interest; if the defendant confess judgment according to the *scire facias*, the plaintiff is not entitled to a writ of enquiry of damages, to recover more than the penal sum; (the principal and interest accruing by lapse of time, amounting to more;) but must take execution upon the original judgment, with the addition only of the costs upon the *scire facias*. *Gosby's executor v. Bell's administratrix*, p. 282—283.

9. In a debt on a bill penal, a judgment entered upon *nil dicit* or *non sum*

information, ought not to be reversed on the ground that the declaration, though describing the bill penal correctly as to the principal sum, penalty, and date, omits to mention that the debt is payable "with interest from a day prior to the date;" and that the judgment, in conformity with the bill penal, is entered, for the penalty, to be discharged by the principal, with such interest, and costs. *Harper v. Smith*, p. 389—390.

10. A judgment for the defendant, upon pleadings not going to the foundation of the action, is no bar to the plaintiff's bringing another action for the same cause. *Lane v. Harrison*, p. 573—580.

11. In debt on a bond with collateral condition, if the plaintiff, by replication to the plea of conditions performed, charge the breach defectively, but fully avoid, by other replications, such other pleas of the defendant as go to the foundation of the action; to which replications, demurrers are improperly filed; and the Court enter judgment for the defendant, generally, upon all the pleadings; such judgment is erroneous; it should only be, that the faulty replication is not sufficient in law, &c., and therefore that the plaintiff take nothing, &c. *Ibid*.

JURISDICTION.

1. Actions may be brought in the Courts of this State, upon contracts entered into, or personal injuries committed, any where. In general, it is not necessary to state in the declaration, where the contract arose, or the injury was committed:—but this is sometimes necessary; and, then, (for the sake of obviating the objection of a variance, or the like,) the plaintiff is permitted to state, by a fiction, under a *videlicet*, that the place is within the jurisdiction of the Court in which the suit is brought; which fiction, being in furtherance of justice, can not be traversed. *Shaver v. White and Dougherty*, p. 110—114.

2. In cases in which the plaintiff does not use this fiction, the defendant is not, in general, permitted to aver that the cause of action arose in another Country, unless he wishes to justify the act by the laws of that Country; or to shew, thereby, that he is not responsible in the particular form of action in question; in which cases, the locality of the act forms an essential part of his defence: but such plea does not go to the juris-

diction of the Court, but only to the justification of the defendant. *Ibid*.

3. A creditor residing in Maryland, may sue out an attachment in Chancery in Virginia, against his debtor residing also in Maryland, and others residing in Virginia, indebted to, or having in their hands effects of, such debtor. *Williamson & others v. Bowie & others*, p. 176—180.

4. A suit in Chancery lies against a defendant, who, claiming title under a deed alleged to be fraudulent, hath taken possession of and converted to his own use sundry articles of personal property; the plaintiff praying the Court to set aside such fraudulent deed, and compel the defendant to render a just account of the property so wrongfully taken, and to pay the value thereof to the plaintiff. *Cocke v. Harrison*, p. 184—185.

5. A person returned as appearance bail, who denies that he ever executed the bail bond, is not precluded from obtaining relief in equity, by his failing to appear and plead *non est factum* at law, after being informed that his name was subscribed to such bond; for if, in fact, he did not execute the bond, he had regularly no day in Court, and was therefore not bound to take any step for his relief in the action at law. *Spotswood v. Higgenbotham*, p. 313—315.

6. In a case where the remedy at law was considered doubtful when the party applied to a Court of Equity, it would be too strict to deny him admittance into that court for relief. *Ibid*.

7. See EXECUTORS AND ADMINISTRATORS; *Pendleton's adm'r's v. Stuart & M'Cull*, p. 377—384.

8. Where a defendant, who had an adequate remedy at law, has been prevented from resorting to it, by a fraudulent representation or promise of the plaintiff, he ought to be relieved in equity. *Poindexter v. Waddy*, p. 418—422.

9. The Superior Courts of law have jurisdiction to grant writs of *Superedeas* to orders of the County or Corporation Courts, binding persons accused of being the fathers of bastard children, to support such children; and the Court of Appeals, in like manner, has jurisdiction to correct errors in the decisions of the Superior Courts of law on the same subject. *Mann v. the Commonwealth*, p. 452—453.

10. See FRAUD; *West's ex'or v. Logwood*, p. 491—506.

11. See APPEALS; *Stone v. Ware & Smith*, 541-550.

JUSTICES OF THE PEACE.

1. Trespass *vi et armis*, and not *case*, is the proper action, against a Justice of the peace, for maliciously and corruptly, with intent to injure and oppress, and without probable cause, issuing a Search-Warrant, by virtue whereof a Constable forcibly enters the plaintiff's close, and takes and carries away from his possession, certain slaves which he held as his property. *Muse ex'or of Heferman v. Vidal*, p. 27-29.

2 The form of the declaration in such action. *Ibid*.

JUSTIFICATION.

1. It is a principle, that, if a party be justified, as to a transaction, in the Country or place in which it is committed, he is justifiable every where. *Shaver v. White & Dougherty*, p. 110-114.

2. See SLANDER; *McAlexander v. Harris*, p. 465-469.

L.

LAWS.

1. Adjudged cases can be safely relied on as precedents, only as to *points actually* in issue between the parties, and not as to such as may be deemed *extrajudicial*, unless indeed, in relation to the latter, they shall have ripened into law by various and successive decisions.—*Lewis & others v. Thornton & wife*, p. 87-98.

2. Where the *principles* of a decree of the Court of Appeals seem to be opposed to it's *letter*, the literal interpretation ought not to be relied on as a binding precedent. *Ibid*.

3. The law of *Waste*, in it's application *here*, must be varied and accommodated to the circumstances of our new and unsettled country. *Findlay v. Smith & wife*, p. 134-155.

LEASES.

1. In the sale of a house and tenement in a town, if the Vendor fail to shew the lease to the Vendee, and do not inform him of a Covenant therein, that, in case of destruction of the house by fire, the lease shall terminate and become void; this is such a concealment as vi-

tiates the contract; and if the house be destroyed by fire in a short time, Equity will relieve the vendee by injoining the vendor from collecting the purchase money, and by directing his notes for the same to be given up and cancelled.—*Snelson & Co. v. Franklin*, p. 210-212.

2. See COVENANT; *Backus v. Taylor*, p. 488-490.

LEGACIES.

1. If slaves specifically bequeathed, be in the possession of a person who is at the same time executor of the testator and husband of a legatee, such possession will enure to him in the character of *executor only*, unless there be some election, or some act indicative of an intention to take, in character of husband; especially, where the bequest is to several legatees jointly, and no division among them has taken place.—*Blakey v. Newby's adm'r*, p. 64-71.

2 In this case, a general charge upon the estate of a testator, for the payment of legacies, in aid of a particular fund provided for that purpose, was not enforced against *bona fide* purchasers of the lands, after a great lapse of time; because it might admit of a doubt whether by the terms of the will the charge was upon the *land itself*, or only upon the *profits thereof*; because the lands might be presumed to be exonerated by the requisition of *security* from the devisees for payment of the legacies; and, above all because the testator left a personal estate abundantly sufficient for that purpose, which estate was wasted by the executors. *Lewis & others v. Thornton & wife*, p. 87-98.

3. Under circumstances, a legacy bequeathed in September 1779, to the testator's daughters, was not reduced by the scale of depreciation, but directed to be paid in *specie*; the words "*current money*," being omitted in the Will; and it appearing presumable, from acts of the testator nearly contemporaneous, and from the great value of the lands devised to his sons, by whom he directed the legacy to be paid, that he meant *specie*. *Allen v. Bird & others*, p. 100-110.

4. A testator directing a tract of land to be sold, "*when the time is out for which it is loaned*," and the money to be divided between certain children of his, to them and their heirs forever; the legacy does not lapse by the death of any of them, after the testator, and before

the expiration of the lease; but is a vested interest, and belongs to their legal representatives. *Selby & wife v. Morgan's ex'or*, p. 156-157.

5. It seems, that, where a decree against executors, for a legacy, is made upon their *confessing assets*, to satisfy the same, (without specifying whether such *assets* consist of money or other property;) such decree may with propriety direct that they pay the legacy and interest, with the costs of the suit, *out of the said assets, if so much thereof they have*; if not, out of their own estates. *McRae's ex'ors v. Brooks & wife*, p. 157-159.

6. A decree against executors for a legacy, though made upon confession of assets, and without their expressly demanding bond and security from the plaintiff, is yet erroneous, if it do not require such bond and security to be given, before the defendants be compelled to pay the legacy. *Ibid*.

7. See SLAVES; *Ellison & others v. Woody & others*, p. 368-373.

8. If a testator give to one of his children a pecuniary legacy, expressly declaring that sum to be *all* he intends such legatee to receive of his estate; a general residuary bequest, to "*all his children*," (without mentioning names,) must be construed as not including that child. *Ibid*.

LIEN.

1. A testator devised to the President and Professors of a College, and their successors in office forever, 500 bushels of Corn, "*to be paid them annually on the 25th of December*," for the establishment and support of a free school; directing that 1000 acres, part of a certain tract of land, to be laid off by certain metes and bounds within twelve months after his decease, "*stand pledged forever, for the full and complete execution of this devise*." By other clauses, he bequeathed sundry pecuniary legacies to a large amount; directing, particularly, in each bequest, payment to be made by *his Executors*. He also emancipated all his slaves, and devised to *his sisters all the residue* of his estate. It was decided, that the devise to the free school was *not* a charge upon the estate generally. *Williams & Mary College v. Hodgson & others*, p. 163-165.

LIFE ESTATES.

1. See EMBLEMENTS; *Thompson's adm'r. v. Thompson's ex'or*, p. 514-519.

LIMITATIONS OF ACTIONS.

1. The right to issue a *scire facias* upon a Judgment, is not barred by the Act of Limitations, in a case where execution was issued in due time, and returned no effects, though more than ten years elapsed between the return of the execution, and date of the *scire facias*. *Gee v. Hamilton and wife*, p. 32-33.

2. A plaintiff suing for slaves as administrator of his wife, is not barred by a decision against him in her lifetime, in a suit to which she was not a party; the ground of that decision being, that, under the act of limitations, the opposite party had obtained a legal title to the slaves by five years possession commencing *during the coverture*; during which, also, the right of the wife accrued; and the husband having never had possession *in his character as husband*. *Blakey v. Newby's adm'r*, p. 64-71.

3. If a widow holding, by virtue of her husband's will, certain slaves for life, with power to dispose of them afterwards, among *his children*, as she should think proper, bequeath them to trustees for the benefit of *one only* of those children; such child must be considered as holding the slaves under her will, *adversely*, in relation to the other children, and therefore may be protected by the Act of Limitations from a claim in their behalf. *Hudson's v. Hudson's adm'r*, p. 352-357.

4. In a case where it is necessary to plead the act of Limitations, it ought, in order to form a bar, to be *specially* pleaded, or at least insisted on; that is, the term prescribed by the statute should be *particularly*, (if not *formally*) pleaded, or relied on, to let in the plaintiff to shew, in his replication, that, within that term, an original had been sued out, if the fact were so, and thus to avoid the bar. *Ibid*.

5. A possession of slaves commencing *during the infancy* of a plaintiff, can not operate a title in favour of a defendant, until it has continued five years after such infancy has ceased. *Ibid*.

6. When the act of Limitations once begins to run, it runs over all *mean* acts, such as coverture, infancy, &c. *Ibid*.

7. A provision in a Will, that the money arising from the sale of the testator's personal property, *after payment of his just debts*, shall be applied to certain purposes, does not create a trust for the

payment of the debts, nor take any debt out of the operation of the act of limitations. *Brown's adm'r v. Griffiths*, p. 450-452.

8. A bill of review to a decree pronounced before the 11th of February 1814, (see Acts of 1813, c. 12 § 3,) could not be received after five years had elapsed from the date of such decree. *Shepherd v. Larue, &c.* p. 529-531.

9. It is not necessary to plead the act of limitations against a bill of review; for it ought to appear in the Bill itself, that it is exhibited within the time prescribed by law, or that the complainant is protected by some of the savings in the Act; otherwise it ought not to be received. *Ibid.*

10. In such case, if the fact alledged to prevent the operation of the act be not true, it may be denied by the answer of the other party; and, on the proofs, (if in his favour,) the bill of review should be rejected. *Ibid.*

LIMITATIONS OF ESTATES.

1. A testator, by his will, lent certain slaves to his daughter *Betty L.* during her natural life; and "immediately after her death," he gave the said slaves and their increase, to her children *then living*, and to the legal representatives of such of them as should be dead; "but, in case *all her children* should die in the lifetime of "her husband *James L.*, then the said "slaves to go to him." *James L.* died after the testator, *in the lifetime of Betty L.* and bequeathed all his slaves to children of his by a former wife. *Betty L.* married again, and had other children, who, together with a child of her's by *James L.* were living at the time of her death. It was determined that her children by the second husband were, equally with that child, entitled to the slaves bequeathed to her as aforesaid. *Colemans v. Holladay*. p. 47-61.

2. The words of a contingent limitation being, "in case *S. N. C.* without "issue of body lawfully begotten, then, " &c., the words, "die," and, "her" may be supplied, as evidently intended by the testator; but not the word "leaving," which he might not have known to be necessary in law to give the limitation effect, and therefore might not

have intended to use. *Lynck & wife v. Hill & wife*, p. 114-116.

3. Certain real and personal estate being devised to *S. C.* "her heirs and assigns forever; but, in case she should "die without issue of her body lawfully "begotten, then and in that case, to be "equally divided between *S. C. & S. C. II.* to them and their heirs and assigns forever;" this limitation over was too remote and could not take effect. *Ibid.*

4. A testatrix bequeathed certain slaves "and their increase to her nephew *J. A.* to him and his heirs forever; but, in case he should die without heir, then and in that case, to be "equally divided between her two nieces, "*M. A.* and *P. A.*" This was adjudged a good limitation over, upon *J. A.* dying without issue at the time of his death, to *M. A. & P. A.* who survived him; on the ground that the devise over to the nieces was, to them merely, and not to them and their heirs; purporting therefore a personal benefit to themselves; which construction was fortified by the words "then and in that case," and "equally to be divided," found in the bequest. *Timberlake & wife v. Graves*, p. 174-175.

5. A testator in the year 1803, devised the residue of his estate to his brother *Isaac*; in case he died without issue, to be equally divided between his uncle's children; (naming them;) without adding any words of perpetuity. This limitation over was good, and took effect, upon the death of *Isaac* without issue at the time of his death. *Gresham v. Gresham & others*, p. 187-188.

6. A testator gave certain parts of his estate to his two daughters, with a proviso, that, should either of them die "without lawful issue," her part should go "to the other." This was a good limitation over, in the event of the death of either, without lawful issue living at the time of her death. *James v. McWilliams & wife*, p. 301-302.

7. In a case agreed, the parties, after setting forth a clause in a Will, by which a limitation over in favour of the plaintiff, was to take effect upon the death without lawful issue of a legatee of a particular estate, proceeded to state that the said legatee, being more than twenty years old, died without leaving any children living at the time of her death; having had only one, who was

dead at that time. This was adjudged so defective a case, that a *venire de novo* was awarded, because there might, nevertheless, have been issue of the said legatee, living at the time of her death; and, also, because the whole will was not stated. *Ibid.*

8. A testator (whose Will was dated in 1804,) directed the residue of his estate to be kept together, until his son W. C. arrived to 21 years, and, then, that an equal division of all his personal property be made between his sons W. C. and D. C.; "and, if either of his said sons died without lawful heir, that the surviving brother should inherit all the estate of the deceased." This was a good limitation over, in favour of the survivor, upon the death of the other son without issue. *Cordle's adm'r v. Cordle's ex'or*, p. 455-456.

9. By a deed dated in 1769, certain slaves were given to a daughter of the donor, and her husband, for and during their natural lives or that of the longest liver of them; and, after the decease of them both, the said slaves and their increase to be equally divided among the heirs of her body; and, in default of such heirs, to return and be divided equally between the donor's son and other daughter, and their heirs and assigns forever. By virtue of this deed, the first female donee took an estate for life only; the words "heirs of her body," coupled with the words, "equally to be divided between them," being to be construed not as words of limitation, but of purchase, describing the persons intended to take. *Self's adm'r v. Tune*, p. 470-472.

MALICIOUS PROSECUTION.

1. Case for malicious prosecution, and not trespass *vi et armis* is the proper action against a person who, maliciously and without probable cause, sues out an attachment, and causes it to be levied on the property of another. *Shaver v. White & Dougherty*, p. 110-114.

MARRIAGES.

1. A prosecution under the 13th section of the Act of 1792, concerning incestuous marriages, was a criminal prosecution, and therefore, it seems, the direction therein, that such prosecution should be instituted in the High

Court of Chancery, was unconstitutional. *Attorney General v. Broadbush & wife*, p. 116-117.

MARRIAGE SETTLEMENTS.

1. Upon a bill of Injunction, exhibited by husband and wife and their trustee, to prevent the husband's creditors from selling the property covered by a deed of marriage settlement; the deed appearing on its face, and by the oaths of all the complainants, including the trustee, (who appeared to have no interest except as a party to the suit,) to have been executed before the marriage; and it not being charged, in the answers, or any of them, that the said deed was in fact antedated; though it was not attested by any subscribing witness, but was admitted to record upon acknowledgments of the parties only; and though the defendants, in their answers, averred, that the said acknowledgments took place after the marriage; the Court could not with propriety dissolve the Injunction, on the ground that the said Deed was antedated. *Scott & wife v. Loraine & others*, p. 117-119.

2. It seems, that property conveyed, by deed of marriage settlement, in trust, that the husband and wife shall be permitted, during their joint lives, to enjoy the profits, may be taken in execution to satisfy a debt, incurred after the marriage, for supplies furnished for the proper support of the husband and wife. *Ibid.*

3. See *Powers, Banister & wife v. McKeuzie*, p. 447-448.

MILITIA.

1. If a militia-man employ and pay a substitute to perform his tour of duty, and, thereupon, be discharged by the commanding officer; he can not recover back the money paid, upon the ground that the defendant, after repairing to the place of rendezvous, and commencing the march, was discharged as a supernumerary, and therefore never performed the tour of duty. *Keys v. McFarbridge*, p. 18-20.

MILLS.

1. In trespass for destroying a mill-dam erected by the plaintiff, who gives in evidence the transcript of an inquisition upon a writ of *ad quod damnum*,

the Court, on the defendant's motion, ought to instruct the Jury, that it was incumbent upon the plaintiff to erect his dam in the position prescribed in the said inquisition, and (if they be satisfied that the said dam was erected in a *different* position, in consequence whereof a ford across the stream, being part of a public road legally established, was *obstructed and shut up*,) that such dam was a public nuisance and abateable by the defendants. *Dimmett & others, v. Eskridge*, p. 308-311.

MISTAKES.

1. A contract for sale of land, *rescinded* in equity, on the ground that both parties were *mistaken*, as to the *situation* and other circumstances materially affecting the value of the land. *Chamberlaine & others v. Marsh's adm'r*, p. 283-287.

2. After dissolution of *one* Injunction, *another* was granted to the *same* judgment, and made perpetual, upon *new* matter, *not known to the Complainant before the first was dissolved*; it appearing that the contract in question, *though not tainted with fraud*, was founded upon a *mistake*, in relation to the existence of an important fact, of which both parties were ignorant. *Armstrong & wife, v. Hickman*, p. 287-301.

MORTGAGES.

1. Under the Act of 1792, (ed'n 1794, 1803 and 14, c. 90, § 4,) a mortgage, *not recorded within eight months from its date*, was void against a *bona fide* purchaser for valuable consideration, who had no notice thereof *when he made the purchase, paid his money and got his deed*; notwithstanding he had *actual notice before the eight months* from the date of the mortgage had expired. *Rootes v. Holliday & Welch*, p. 251-261.

2. Upon a Bill to foreclose a mortgage, against the mortgagor and a purchaser from him, the plaintiff filed an amended bill stating that the latter, at the time of his purchase, received of the mortgagee a conveyance of sundry other lands; and praying a discovery thereof, and *general relief*; but *without any special prayer* that those lands be subjected to satisfy the *plaintiff's claim*. It appearing that the mortgage was not duly recorded, and the purchaser not chargeable with notice; a decree dismissing the bill altogether, was affirmed; but without prejudice to

the plaintiff's right to proceed against such other lands. *Ibid*.

3. If a Vendor of land take a duly recorded mortgage of the land itself, to secure the purchase money; the land mortgaged is liable for the debt, to the full amount thereof, *into whose server hands it may come*; and, in the event of its being inadequate, the *Vendor's estate* is bound to make good the deficiency; but a purchaser from him is not *personally* liable therefor, without a special agreement to that effect. *Bumgardner & others, v. Allen*, p. 439-447.

4. In a Court of Equity, several Mortgages, though appearing upon their face, to be for distinct debts, will, *under circumstances*, be considered as merely additional evidences of, and securities for, one original debt. *Anderson's adm'r v. Davies's adm'r*, p. 484-486.

5. *Quere*, whether it be regular, in a decree for sale of mortgaged premises, to direct the proceeds of such sale to be paid over to the plaintiff, before the sale shall have been confirmed by the Court? *Ibid*.

6. In a suit in Chancery, to foreclose a mortgage, against purchasers claiming under a devise of the mortgagor; not only the persons from whom they *immediately* derive their title, but also the said devisee, or his heirs, and all other devisees of the equity of redemption, ought to be made parties; notwithstanding such equity was devised to some of them upon *conditions*; for whether such conditions were complied with, cannot be legally investigated, until they are made parties. *Mago v. Tomkies*, p. 520-528.

7. Where lands devised to be sold, have been sold by *one* of several executors, *all* the executors ought to be parties to a suit to foreclose a mortgage previously existing upon those lands. So, also, *all* the purchasers;—in order to be subjected to a *rateable* contribution to satisfy the mortgage. *Ibid*.

8. See ANNUITIES. *Ibid*

9. A mortgagee of lands and slaves, can not be compelled to resort to a sale of the slaves before he shall disturb the possession of *bona fide* purchasers of the lands from the mortgagor;—but the decree against such purchasers ought to permit them, after satisfying the claim of the mortgagee, to seek indemnity out of the mortgaged slaves, or *from* the estate of the mortgagor, or of any other person liable to such demand, either so far as the mortgagee might be

able to charge such party, or otherwise. *Ibid.*

10. A creditor by mortgage or deed of trust, has not a right, *without a written agreement, to tack to such mortgage, or deed of trust, a note or bond of the debtor, in exclusion of another mortgage, or deed of trust, bearing date either before or after such note or bond.* *Colquhoun v. Atkinsons.* p. 550-557.

MOTIONS IN A SUMMARY WAY.

1. *It seems, that, if a judgment be rendered, in a Federal Court, against the executors of a surety, and they pay the money; they can not recover it against a devisee of the principal debtor, by motion or any action at common law, in the General Court, or any other court of law, of this Commonwealth.* *Cabell's ex'ors v. Meggison's adm'rs.* p. 202-207.

NEGOTIABLE NOTES.

See POWERS; *Mann v. King.* p. 428-430.

NEW TRIALS.

1. Upon the Court's overruling a defendant's motion for a new trial;—if he file a bill of Exceptions to such opinion, stating all the *facts proved* to the Jury; from which it appears that, upon the *merits*, the plaintiff ought not to recover; the judgment ought to be reversed, and a new trial granted. *Keys v. McFaridge.* p. 18-20.

2. If a motion for a new trial on the ground that the verdict is contrary to evidence, be overruled, a bill of exceptions to the Court's opinion ought not to state *all the evidence* given in to the Jury, but only the *facts* appearing to the Court to have been proved. *Bennet v. Hardaway administrator of Jones.* p. 125-132.

5. Upon a Bill of Injunction filed, a new trial at law was granted; a verdict was found for the complainant, but certified by the Judge to be against the *weights of evidence*; another trial being directed, a second verdict was found as before; whereupon, the Judge certified, with the verdict, *all the evidence* given to the Jury; from which it *clearly* appeared that the *merits* of the case were against the complainant. The Court of Appeals, thereupon, did not award another trial, but dissolved the Injunction,

and dismissed the Bill with costs. *Ruffners v. Barrett.* p. 207-209.

6. Upon a motion for a new trial, on the ground that the damages found by the Jury are excessive; if the plaintiff release such part thereof as, in the Court's opinion, ought to be released, and thereupon judgment be entered for the residue; such judgment, not appearing unreasonable, should be sustained by the appellate Court. *Preston v. Bowen.* 271-277.

7. A motion for a new trial, on the ground that the verdict is contrary to evidence, ought to rest on the evidence *actually given in at the trial*, exclusive of all other: especially, *affidavits* taken *ex parte*, ought not to be heard on such motion. *Street v. St. Clair.* p. 457-458.

NON EST FACTUM.

1. A plea of *non est factum*, in behalf of a person returned as appearance bail, who denies that he ever executed the bail bond, is regular and proper. *Spotswood v. Douglas.* p. 312-313.

2. A plea of *non est factum* ought, in general, to be received by the Court, notwithstanding the defendant has previously pleaded *payment*; especially, if it be offered under circumstances shewing it is not intended for the purpose of delay. *Jackson v. Webster.* p. 462-464.

3. The affidavit to the plea of *non est factum*, is not rendered defective by inserting the words, "*to the best of the defendant's knowledge and belief.*" *Ibid.*

4. No man can be required to *swear positively*, (if at all,) to *legal inferences.* *Ibid.*

NOTES NEGOTIABLE.

1. The *bona fide* owner of a bank note, having transmitted one half thereof by the mail, which has been stolen therefrom, or is lost, can not demand payment from the Bank of any part of it's amount, in consequence of *holding the retained half merely*; but he is entitled to demand the whole amount of the said note, on satisfying the Bank of the verity of the above facts, or *establishing* them by the judgment of a Court of Equity, and giving, in either case, a satisfactory indemnity, to secure the Bank against future loss from the appearance, and setting up of the other half of the note. *The Bank of Virginia v. Ward.* p. 166-169.

2. The right of a *bona fide* assignee, for valuable consideration, of a note negotiable at the Bank of Virginia, to recover against the maker and indorsers of such note, is not to be affected by any *equity* of which he had no notice when he received such note. *M'Neil and Turner v. Baird*, p. 316-318.

3. If the maker of a Note negotiable at the Bank of Virginia, file a Bill of injunction against the payee and his assignee, on the ground of an equity affecting the *payee only*; the Court of Chancery, having before it all the parties concerned, ought not to *discharge* the *maker* altogether, nor to turn over the assignee to a suit at law against the *payee*; but should decree against the *latter*, in the *first* instance, that he pay the amount of the note to the assignee, and the costs *at law*; and liberty should be reserved to the assignee to apply to the Court to dissolve the injunction as to the *maker*, for so much of the said debt as he may not be able to recover from the *payee*; in which case, a decree ought also to be rendered in favour of the *maker* against the said *payee*, for so much thereof as he may be compelled to pay as aforesaid. And the decree should farther direct, that the action at law in favour of the assignee against the *payee*, if any be pending, be perpetually enjoined, except as to the costs. *Ibid.*

4. In such case, the *payee* should pay to *both* the other parties, their *Costs* in Chancery, and in the Court of Appeals, upon an appeal taken by himself and the assignee, in the decision of which *both* the other parties *substantially* prevail. *Ibid.*

NOTICE.

1. A derivative purchaser with notice, is protected by the want of notice in him under whom he claims. *Curtis v. Lunn executor of Jones*, p. 42-45.

2. The ground on which an original purchaser *with notice*, is postponed in *an equity*, is, that the taking the legal estate, after notice of a prior purchase or equity, makes the party a *mala fide* purchaser, and amounts to a *fraud*. In order to fix this fraud, however, the proof of notice must be clear. If it be merely doubtful, a presumption of fraud will not take place. *Ibid.*

3. A settlement of an Executor's administration account, certified by com-

missioners on a day subsequent to his death, and not appearing to have been made, in his life time, with notice to himself, nor, after his death, with notice to his executor, is erroneous, and ought not to be received as the ground of a decree against his estate. *Boyd executor of Hoskins v. Kaufmans*, p. 45-47.

4. *Quere*; if an Executor die indebted to the estate of his testator, without any judgment or decree against him for the balance due; and his executor, *without notice of such debt*, apply the assets of his estate to the payment of debts of inferior dignity; is he guilty of a *devastavit*? *Ibid.*

5. Under the Act of 1792, (edition 1794, 1803 and '14, c. 90. § 4,) a mortgage, not recorded within eight months from its date, was void against a *bona fide* purchaser for valuable consideration, who had no notice thereof *when he made the purchase, paid his money, and got his deed*; notwithstanding he had actual notice before the eight months from the date of the mortgage had expired. *Rooses v. Hollday and Welch*, p. 251-261.

6. The right of a *bona fide* assignee, for valuable consideration, of a note negotiable at the Bank of Virginia, to recover against the maker and indorsers of such note, is not to be affected by any *equity* of which he had no notice when he received it. *M'Neil & Turner v. Baird* p. 316-318.

7. If the drawer of a protested bill of exchange, being applied to, in behalf of the holder, for payment, acknowledge the debt to be just and promise to pay it; saying nothing about his having received notice; the holder, in an action of debt, upon the bill, against such drawer, is not bound to prove that notice was given him of the protest.—*Walker v. Lavery & Gantley*, p. 487-488.

NUISANCE.

1. In trespass, for destroying a mill dam erected by the plaintiff, who gives in evidence the transcript of an inquisition upon a writ of *ad quod damnum*, the Court, on the defendant's motion, ought to instruct the jury that it was incumbent upon the plaintiff to erect his dam in the position prescribed in the said inquisition; and, (if they be satisfied that the said dam was erected in a *different* position, in consequence whereof a ford across the stream, being part of a public road legally established,

was obstructed and shut up,) that such dam was a public nuisance and abateable by the defendants. *Dimmett v. Eskridge*, p. 308-311.

2. A partial obstruction of a public highway, is an abateable nuisance. *Ibid.*

O.

OATHS.

1. *It seems* that, where a high Sheriff has given the bonds and taken the oaths required by law, when he originally qualified, and, before his first year of service expires, is continued in office for the second year by a Commission from the Executive, and thereupon gives new bonds, it is not incumbent upon him to shew, in an action against his deputy, that he a second time took the oaths of office. *Lane v. Harrison*, 573-580.

2. Where the high Sheriff is continued in office the second year, and takes a new bond of his deputy, (who is also continued,) for faithful performance of the duties of his office, *it seems* that, in an action upon such bond, the plaintiff is not bound to shew that the deputy took the oaths of office a second time, or that his appointment was approved by the County Court. *Ibid.*

OFFICE JUDGMENTS.

1. A judgment at rules in a clerk's office, can not lawfully be made final on a declaration in debt, for money lent, and not alleged to be founded on any specialty, bill, or note in writing; until a writ of enquiry has been awarded and executed. *Hunt & others v. M^cRae*, p. 454-455.

ONUS PROBANDI.

1. The Commonwealth, by patent, granted a tract of land, containing 70,202 acres, (within specified metes and bounds,) by a survey containing a surplus of 42,000 acres, held by titles having legal preference to the warrants and rights upon which the grant was founded. A reservation was therefore made, in favour of those titles, in general terms. It was decided that, under the terms of this patent, the grantee was entitled to recover, in Ejectment,

all the land within the metes and bounds thereof, except such as the defendants might shew themselves entitled to, under the said reservation. *Hopkins & Watson v. Ward*, p. 38-41.

2. In the case of slaves brought into this State, from any of the United States, before the Act of 1792, the fact of the master's having taken the oath required by law within ten days after removal, should be presumed from twenty years possession of them, as slaves, without their claiming freedom; so that, in such case, the onus probandi in the suit for freedom should be thrown on the plaintiffs: but this presumption may be repelled by circumstances. *Abraham & others v. Matthews*, p. 159.

3. In debt, on a bond conditioned that the obligor shall make a title to a tract of land, when thereunto lawfully required; if the defendant plead covenant performed, and issue be joined thereupon, the plaintiff is not bound to prove on his part any demand of a deed. *Pate v. Spotts*, p. 394-397.

OVERSEERS OF THE POOR.

1. *Quare*, whether any action can be maintained on a bond executed to "C. H. &c. overseers of the poor" of M. County, with a condition, that, "if the first named obligors shall well and truly collect, from the Tythables of said County, the poor rate for the year" and pay the same to the orders "of the said overseers, then the said obligation is to be void," &c.? *Horton & others v. Haymond & others*, p. 399-401.

2. An action against a collector of poor rates, upon his bond to the overseers of the poor, can not be maintained, without an averment in the declaration that the plaintiffs are overseers at the time of the institution of the suit. *Ibid.*

3. A person accused of being the father of a bastard Child, can not lawfully be bound to support such child, without a written charge before the magistrate, by its mother; nor unless it appear that the warrant was issued by the magistrate upon the application of the Overseers of the poor, or one of them, or that they, or one of them, were parties to the cause in the Court making the order against such person. *Mann v. the Commonwealth*, p. 452-453.

P.

PAPER MONEY.

1. Under circumstances, a legacy bequeathed in September 1779, to the testator's daughters, was not reduced by the scale of depreciation, but directed to be paid in *specie*; the words "*current money*," being omitted in the Will; and it appearing presumable, from acts of the testator nearly contemporaneous, and from the great value of the lands devised to his sons, by whom he directed the legacy to be paid, that he meant *specie*. *Allen v. Bird & others*, p. 108-110.

PARTIES.

1. A Court of Chancery ought not to give costs, (against complainants,) to parties erroneously made by it's own direction. *Lewis & others v. Thornton & wife*, p. 87-98.

2. The officer who returned the writ and bail bond, ought, as well as the plaintiff at law, to be made a party defendant to a bill of Injunction filed by the person returned as bail, who denies that he ever executed the bond; for the officer is interested in the question in controversy, and should be a party, that final and complete justice may be done. *Spotswood v. Higgenbotham*, p. 313-315.

3. In such case, in the same suit in Chancery, a decree may be rendered in favour of the plaintiff at law, (though defendant in equity,) against such officer, if justice should require it. *Ibid.*

4. A demurrer to a bill in Chancery against a guardian for advances of money &c. by the plaintiff for the use of the ward, ought not to be sustained on the ground that the ward ought to have been a party: but if, upon the answer of the guardian, it should appear proper, the Court should then direct the ward to be made a party. *Sutton v. Gatewood & wife*, p. 398-399.

5. In a suit in Chancery, to foreclose a mortgage, against purchasers claiming under a devisee of the mortgagor, not only the persons from whom they immediately derive their title, but also the said devisee or his heirs, and all other devisees of the equity of redemption, ought to be made parties; notwithstanding such equity was devised to some of them upon conditions; for whether such conditions were complied

with, can not be legally investigated, until they are made parties. *Mays v. Tomkies*, p. 530-538.

6. It is not sufficient to make a person a party as *Executor*, and to call upon him to answer as such, if he be interested in the controversy as a *devisee*, or should be called upon to answer as to his individual interest or transactions. *Ib.*

7. Where lands devised to be sold, have been sold by one of several executors, all the executors ought to be parties to a suit to foreclose a mortgage previously existing upon those lands. So, also, all the purchasers; in order to be subjected to a rateable contribution to satisfy the mortgage. *Ibid.*

PARTITION.

1. Upon a Bill for partition of land; a person who claims part thereof by adverse title, being made one of the defendants, for the purpose of obtaining a surrender of title deeds, and a conveyance of such part, from him; if the Court decree against him "that the said deeds be set aside, and declared void," and that the title be quieted," and, by consent of parties, the cause be continued as to the other defendants: *quære*, whether such decree be final, or interlocutory, as to him? *Alexander's heirs v. Coleman and wife*, p. 328-329.

2. See *CAVARS*; *Christian's devisee v. Christians*, p. 534-541.

3. In decreeing a partition in favour of a plaintiff claiming by *equitable title*, the Court ought not to direct that the holders of the legal title stand *seised* of the plaintiff's part to his use; but that they convey the same, by deed, to him and his heirs. *Ibid.*

PARTNERSHIP.

1. Although a person having a claim against a Mercantile Company, can not set off such claim, against a debt from himself to one of the partners; yet it is competent for him to charge that partner, in equity, (in extinguishment of the said debt,) for so much of the surplus of the partnership property as may be due to such partner on a settlement of the partnership accounts; for the purpose of which settlement, and also for that of ascertaining and adjusting his own claims against the company, all the partners should be made defendants to his Bill. *Dunbar v. Buck*, p. 34-36.

2. *It seems*, that, upon an attachment for a debt claimed as due from one co-partner, the sheriff must seize *all* the partnership effects, and sell a moiety thereof undivided; in which case, the vendee will be tenant in common with the other partner: for if he seized but a moiety, and sold *that*, the other partner would have a right to a moiety of such moiety. *Shaver v. White & Dougherty*, p. 110-114.

3. A declaration in behalf of a mercantile company, by the name of the firm, (without mentioning the names of the partners,) is good after a verdict for the plaintiffs upon the general issue. *Fate v. Bacon & Co* p. 219-220.

4. If one of two partners in trade give a bond or note, without the consent of the other, and for a debt not contracted with or due from the partnership; such bond or note is not binding on such other partner, at law; nor will a Court of Equity hold him bound on the ground that the debt in question was contracted by the partner who gave the bond or note, for goods the greater part of which were applied to the use of the firm; the vendor having retained no lien on the goods so sold; and it not appearing that the other partner agreed to pay his proportion thereof, or was indebted to the partner who contracted the debt. *Poindexter v. Waddy*, p. 418-422.

5. A new partner, received into a mercantile firm upon his buying out the share of an old partner, is not bound to pay any part of the debts previously due from the firm, without a contract on his part to that effect. *Ibid*.

6. *It seems*, that a Bill in Equity properly lies to subject the estate of a secret partner in trade to the payment of a debt contracted by the ostensible members of the firm. *Cocke v. Upshaw, & Prichett ex'or of Burnett*, p. 464-465.

7. In such case, if the fact of the secret partnership be doubtful on the testimony, the Court should direct an issue to ascertain it. *Ibid*.

8. The declaration was upon a general *indebitatus assumpsit* for the hire of five slaves, for which the defendants, being co-partners, promised, on the 1st of January 1811, to pay the plaintiff the sum of \$350, when they should be thereunto afterwards required: the plaintiff could not recover upon a writing signed by one of the defendants, certifying that he had hired of the plain-

tiff five slaves at the price of \$350, and that this should entitle the plaintiff to the other defendant's bond for the same, payable on the 1st of January 1811. *Woody v. Flournoy*, p. 506-510.

PATENTS FOR LANDS.

1. The Commonwealth, by patent, granted a tract of land, containing 70,202 acres, (within specified metes and bounds,) by a survey containing a surplus of 42,000 acres, held by titles having legal preference to the warrants and rights upon which the grant was founded. A reservation was therefore made, in favour of those titles, in general terms. It was decided that, under the terms of this patent, the grantee was entitled to recover, in Ejectment, *all* the land within the metes and bounds thereof, except such as the defendants might shew themselves entitled to, under the said reservation. *Hopkins & Watson v. Ward*, p. 38-41.

2. A patent which is free from objection upon its face, cannot be impeached, in a trial at law, upon any evidence but that of a prior patent remaining in full force. *Norvell v. Camm & wife*, p. 233-245.

3. If a petitioner for land forfeited by non-payment of quit-rents, under the 30th section of the Act of 1748, c. 1., failed to pay the consideration money, within six months after a judgment in his favour, and to get a Patent as the law required; whereupon, another person obtained a patent for the same land by virtue of a treasury land warrant, such patent is good at law against a title derived from such petitioner, unless the length of possession of the tenant and those under whom he claims, accruing before the issuing of such patent, be such as is sufficient to bar a writ of right. *Ibid*.

4. *Quere*, whether the tenant in such case could be relieved in equity? *Ibid*.

5. *Quere*, also, whether the issuing of such patent could be prevented by a caveat, on the ground that the land, having been previously granted and settled, though forfeited by the original patentee for non payment of quit-rents, was not waste and unappropriated? *Ibid*.

6. The heirs of a patentee of Land may recover in Ejectment, against a person who had the use and occupation of the land, as his own, in the life time of the patentee, and so continued until after his death; claiming to hold the

same by *adverse* title; the duration of such possession having been less than twenty years. *See v. Greenlee*, p. 303-304.

7. In such case, if the heirs, being out of possession of the land, have executed a deed of bargain and sale of the same to a third person, such bargainee can not recover in Ejectment; but the bargainors may. *Ibid.*

8. Three demises were laid in a declaration in Ejectment; one, from the patentee of the land, *who was dead*; another, from his *heirs*; and a third from a person to whom *they* had executed a deed of bargain and sale. The plaintiff recovered on the *second* demise; though he could not on the first or third. *Ibid.*

9. A plaintiff claiming an *equitable* title to a tract of land, against the heirs of a trustee, (in whom the legal title was by virtue of an *ancient* patent,) and against the heirs of a third person, who have held possession for a long time by virtue of a patent of *subsequent* date, ought not to be denied the aid of a Court of Equity on the ground of his not producing the *Entry* on which such ancient patent was founded; if it appear that the land in controversy was covered by that patent; as to which fact, if the testimony be doubtful, an issue ought to be directed, to be tried by a Jury. *Boyd & wife v. Hamilton's heirs*, p. 459-462.

PAYMENT.

1. See PRESUMPTIONS; *Wells v. Washington's adm'r*, p. 532-533.

PENALTY.

1. A motion for judgment on a forthcoming bond, in the obligatory part whereof no penal sum is mentioned, can not be sustained; but such bond, with the execution on which it was founded, may be quashed, on a motion for that purpose. *Bragg & others v. Murray*, p. 32.

2. If a bond be given in the usual form with a penalty, conditioned to be discharged by payment of the principal at a future day, "*with interest from the date if not punctually paid*;" such back interest is to be considered an additional penalty, and not recoverable. *Waller v. Long*, p. 71-79.

3. The clause in our Act of Assembly, (R. Code of 1819, c. 128, § 83, p.

509,) which prescribes the sum for which judgment is to be rendered on a bond, meant that, in cases of penalties by way of security, the final justice of the case should be attained in the Courts of law, in effectuating which object, those Courts are to be governed by the same considerations which influence the Courts of Equity. *Ibid.*

4. Upon a *scire facias* to revive a judgment, in debt, for a penal sum, to be discharged by principal and interest; if the defendant confess judgment according to the *scire facias*, the plaintiff is not entitled to a writ of enquiry of *damages*, to recover more than the *penal sum*, (the principal and interest accruing by lapse of time, amounting to more;) but must take execution upon the original judgment, with the addition, *only*, of the costs upon the *sci. fa.* *Cosby's ex'or v. Bell's adm'r*, p. 282-283.

5. A penalty, inserted in a contract, from which the party *may deliver himself*, does not make such contract usurious; and the law is the same where it is in the power of the party, by a compliance with his contract, to convert the penalty into a compensation for services rendered him by the other party. *Pollard v. Baylors & others*, p. 433-439.

6. See USURY; *Ibid.*

PLAINTIFFS.

1. See PRACTICE; *Christians's devisees v. Christians*, p. 534-541.

PLEADING.

1. Issues being joined on the pleas of *no such record*, and the Act of Limitations, if the Jury find for the plaintiff on the second plea, and the Court, *without taking any notice of the first plea*, enter judgment; such judgment ought to be reversed; notwithstanding, on previous pleadings, (which by consent were set aside,) the Court had pronounced that, in fact, there was such a record. *Gee v. Hamilton & wife*, p. 32-33.

2. In debt on a bond, if the defendant plead that the same was obtained by false suggestions and misrepresentations by the plaintiff, "*as per preamble in the said bond*;" and the plaintiff join issue as to the fact, which issue is found against him by a Jury; whatever estoppel (if any) might have been to such plea, is thereby waived, and judgment

ought to be for the defendant. *Chew ex'or of Wormeley v. Moffett & wife*, p. 120-123.

3. Where the declaration charges that the defendant, *contrary to his official duty*, refused to furnish copies of certain surveys, when demanded by the plaintiff; if the defendant be excused by any provision in the land law, from furnishing the copies so demanded, he ought to *plead it specially*. *Preston v. Bowen*, p. 271-277.

4. In trespass for destroying a mill-dam, if the defendants plead that the said dam was unlawfully erected by the plaintiff in a ford where a public road crossed the stream, whereby the said road and ford were obstructed, to the great damage and nuisance of the citizens of the Commonwealth; and that the defendants, in order to abate the said nuisance, peaceably cut down and removed a part of the said dam; and the plaintiff reply, that he did not, by erecting the said dam, *entirely obstruct* the said public road and ford, and that the citizens of this Commonwealth were *not altogether* prevented from passing the same; whereupon issue be joined; such issue is *immateral*, and, after a verdict for the plaintiff, ought to be set aside, and a repleader directed. *Dimmitt & others v. Eskridge*, p. 308-311.

5. See FRAUD; *Taylor v. King*, p. 358-367.

6. In a case where it is necessary to plead the act of Limitations, it ought, in order to form a bar, to be *specially* pleaded, or at least insisted on; that is, the term prescribed by the statute should be *particularly*, (if not *formally*) pleaded, or relied on, to let in the plaintiff to shew, in his replication, that, within that term, an original had been sued out, if the fact were so, and thus to avoid the bar. *Hudson v. Hudson's adm'r*, p. 352-357.

7. If the writ be in *Covenant*, and the declaration in *debt*, to which the defendant pleads *Covenant performed*; the writ (though not made part of the record by *Oyer*) may be resorted to, at the trial, to shew the true date of the *institution* of the suit; the Court may instruct the jury that a deed executed *after the date of the writ*, (though before the filing of the declaration,) is no performance of the condition of the bond declared upon. *Pate v. Spotts*, p. 394-397.

8. In debt, on a bond conditioned that the obligor shall make a title to a tract of land, *when thereunto lawfully re-*

quired; if the defendant plead *covenant performed*, and issue be joined thereupon, the plaintiff is not bound to prove on his part any *demand* of a deed. *Ibid*.

9. A plea of *non est factum* ought, *in general*, to be received by the Court, notwithstanding the defendant has previously pleaded *payment*; especially, if it be offered under circumstances shewing it is not intended for the purpose of delay. *Jackson v. Webster*, p. 462-464.

10. See AFFIDAVITS; *Ibid*.

11. See SLANDER; *McAlexander v. Harris*, p. 465-469.

12. A judgment for the defendant, upon pleadings not going to the *foundation* of the action, is no bar to the plaintiff's bringing another action for the same cause. *Lane v. Harrison*, p. 573-580.

13. In debt on a bond with collateral condition, if the plaintiff, by replication to the plea of conditions performed, charge the breach defectively, but, by other replications, fully avoid such other pleas of the defendant as go to the *foundation* of the action; to which replications, demurrers are improperly filed; and the Court enter judgment for the defendant, *generally*, upon *all the pleadings*; such judgment is erroneous; it should only be, that the faulty replication is not sufficient in law &c, and therefore that the plaintiff take nothing &c. *Ibid*.

14. See DECLARATIONS; *Lanier, Shelton & Coker v. Coker, Crawford & Company*, p. 580-581.

15. See ATTACHMENTS; *Smith v. Pearce*, p. 585-587.

POSSESSION.

1. A deed of bargain and sale, and release, of land from a person not in possession, to another in the same predicament, (the land being, at the time, held by a third person with adverse title,) passes *nothing*, and therefore does not divest the bargainor of his right to recover in Ejectment. *Hopkins & Watson v. Ward*, p. 38-41.

2. A plaintiff suing for slaves as administrator of his wife, is not barred by a decision against him in her lifetime, in a suit to which she was not a party; the ground of that decision being, that, under the act of limitations, the opposite party had obtained a legal title to the slaves by five years possession cum-

mening *during the coverture*; during which, also, the right of the wife accrued; and the husband having never had possession *in his character as husband*. *Blakey v. Newby's adm'r*, p. 64-71.

3. If slaves specifically bequeathed, be in the possession of a person who is at the same time executor of the testator and husband of a legatee; such possession will enure to him in the character of *executor only*, unless there be some election, or some act indicative of an intention to take, in the character of *husband*; especially, where the bequest is to several legatees jointly, and no division among them has taken place. *Ibid*.

4. A person, who has had possession of slaves more than five years, before the date of a deed of emancipation from another who previously was their owner, has a right, in opposition to their suit for freedom, to prove, by the acknowledgment of such owner, made *before execution of the deed*, or by any other legal evidence, that such possession of his was *adverse* to the claim of such owner; *but not by any such acknowledgment made thereafter*. *Givens v. Manns*, p. 191-202.

5. If a proprietor of slaves deliver them to another, who thereupon claims them, as *sold*; any declarations made by the former, *after such delivery of possession, and not in the presence of the latter*, are not admissible as evidence in opposition to such claim. *Ibid*.

6. *Quere*, whether a deed of emancipation from a person having the right to slaves, of which another has *adverse possession at the time*, be competent to confer a right to freedom? *Ibid*.

7. A deed of emancipation can have no effect, if made by a person out of possession; another holding the slaves by a title *adverse* to his; and the possession of such other person having continued for five years before the execution of such deed. *Ibid*.

8. The heirs of a Patentee of Land may recover in Ejectment, against a person who had the use and occupation of the land, *as his own*, in the lifetime of the patentee, and so continued until after his death; claiming to hold the same by *adverse title*; the duration of such possession having been less than twenty years. *See v. Greenlee*, p. 303-304.

9. In such case, if the heirs, being out of possession of the land, have ex-

cuted a deed of bargain and sale of the same to a third person, such bargainee can not recover in Ejectment; but the bargainors may. *Ibid*.

10. The circumstance that slaves are bequeathed to *trustees*, for the use of a person, that he may enjoy the profits of their labour during his life, &c., is not, in itself, sufficient evidence that, *by virtue of such bequest* he had actual possession thereof, *adversely* to the claim of other persons. A possession of slaves, commencing during the infancy of a plaintiff, can not operate a title in favour of a defendant, until it has continued five years after such infancy has ceased. *Hudsons v. Hudson's adm'r*, p. 352-357.

POWERS.

1. If a widow holding, by virtue of her husband's will, certain slaves for life, with power to dispose of them afterwards, among *his children*, as she should think proper, bequeath them to trustees for the benefit of *one only* of those children; such child must be considered as holding the slaves under her *will, adversely*, in relation to the other children, and therefore may be protected by the Act of Limitations from a claim in their behalf. *Hudsons v. Hudson's adm'r*, p. 352-357.

2. Where a testator empowers his widow to dispose of certain slaves "*among his children*," (in general terms,) "*as she shall think proper*," she can not give them *all to one*, nor wholly exclude any; nor can she give any of them to his grand-children; and if she make an appointment violating this principle, it will be avoided in equity, and the property distributed among all the children and their representatives. *Ibid*.

3. A testator vested in his Executors his whole estate, "*to be by them divided, among his heirs, from time to time, as they might think most conducive to the interest of his estate and family*." By another clause, he empowered them to sell his landed interests in a certain undivided estate, and in the State of Kentucky. According to the true construction of this Will, his executors were empowered to *divide his other lands, and his slaves, among his heirs*; but not to *sell them, nor to make an unequal division*; nor to give certain *classes* of the property to some of the devisees, and others to others. *Carrington's executors v. Belt & wife*, p. 374-377.

4. In such case, although the words giving power to divide the estate, "*from time to time*," &c., are very extensive, the Court should rather consider them as authorising the executors *under circumstances*, to deliver the property to the devisees, *before attaining legal age or marriage*, than to hold it up, *indefinitely, thereafter*. If *thereafter*, they could, under any circumstances, suspend an allotment, the circumstances must be such as to render the division more injurious, to the interests of the estate and family, *then*, than at a future period. *Ibid.*

5. If, under such Will, the executors refuse to make an equal allotment to a devisee of full age or married, it may be made by commissioners appointed by, and acting under the control of, a Court of Equity. *Ibid.*

6. If A. give a power of attorney in due form, to B., authorising him to draw checks, indorse notes, and generally to do all "*and every act and deed, to-wards the execution of his business at a certain Bank*," and deposit the said power in the Bank, to be inspected, when called for, by any person interested in matters relating thereto; he is bound to make good, to a *bona fide* purchaser for valuable consideration, any indorsement of a note negotiable at the said Bank, which B. may make in his name as his attorney; notwithstanding the real object of the said power, verbally declared at the time of its execution, was to authorise B. to *renew certain accommodation paper then in Bank*, and not to indorse any other paper. *Mann v. King*, p. 428-430.

7. If, by a deed of marriage settlement, property be conveyed in trust, to be invested in "*Bank stocks, or freehold lands or lots*," the trustee is not thereby authorised to make the investment in *United States six per cent. stock*. *Banister & wife v. McKenzie*, p. 447-448.

PRACTICE.

1. Agreeably to the practice in this State, a subpoena in Chancery, with an endorsement thereon, "*to stop the debts and effects of the absent defendants in the hands of the defendants within the State*," (mentioning their names,) "*to satisfy a debt due from the absent defendants to the plaintiff*," operates, *from the time of the service of that process on the defend-*

ants within the State, as an attachment to stop the payment by them of monies due from them to the absent defendants, and to inhibit a transfer thereof from the said absent defendants to other persons. *Williamson & others v. Bowie & others*, p. 176-180.

2. Upon a judgment in Ejectment, if execution of the Writ of *habere facias possessionem* be prevented for several years by Injunction, the plaintiff is entitled to the writ, on motion, upon a rule; to shew cause, without a *scire facias*; provided not more than a year has elapsed since the affirmation, by the Court of Appeals, of the decree dissolving the Injunction and dismissing the Bill in Chancery. *Noland v. Seekright lessee of Cromwell*, p. 185-187.

3. In such case, if the term laid in the declaration has expired, pending the proceedings on the Injunction, the Court to which the motion is made for the writ of *habere facias possessionem*, may cause the term to be enlarged, and award the writ, upon a rule to shew cause served upon the defendant. *Ibid.*

4. According to the practice in our Courts of Equity, it seems that a Bill to set up a lost bond, need not be supported by the plaintiff's affidavit. *Cabell's ex'ors v. Megginson's adm'rs*, p. 202-207.

5. If the powers of trustees suing in Chancery be vacated, pending the suit, upon a bill filed against them by their *cestuy que trust*; and other trustees be appointed; it seems, that the Court may change the plaintiffs after answer filed, upon terms, of the new trustee's paying the costs already incurred and giving security for future costs: but it can not vacate an Injunction bond given by the original trustees, and direct another to be executed, *without previous notice to the defendants*, that they may shew cause against the motion. *Gall & Garland v. Carter*, p. 245-250.

6. Upon a Bill to foreclose a mortgage, against the mortgagor and a purchaser from him, the plaintiff filed an amended bill stating that the latter, at the time of his purchase, received of the mortgagee a conveyance of sundry other lands; and praying a discovery thereof, and general relief; but *without any special prayer that those lands be subjected to satisfy the plaintiff's claim*. It appearing that the mortgage was not duly recorded, and the purchaser not chargeable with notice; a decree dismissing the bill altogether,

was affirmed; but without prejudice to the plaintiff's right to proceed against such other lands. *Rootes v. Holliday & Welch*, p. 251-261.

7. A final decree by default, may be set aside at a subsequent term, for good cause shewn; in a case where relief can not be given by bill of review, or bill to impeach the decree for fraud in obtaining it. *Erwin v. Vint*, p. 267-271.

8. In this case, the circumstances shewn were, that the defendant against whom the decree was rendered, was prevented by mistake and accident from filing his answer, and that in fact his title was good to the land in controversy. *Ibid.*

9. An action for an assault and battery committed upon an infant, ought not to be brought in the name of the guardian of such infant, but in the name of such infant by his or her guardian or next friend; and error in this respect, before January 1st 1820, was fatal, even after general verdict for the plaintiff. *Stewart v. Crabbin's guardian*, p. 280.

10. When a demurrer to a bill in Chancery is overruled, a decree ought not to be pronounced against the defendant, but leave should be given him to file an answer. *Staton v. Gatewood & wife*, p. 398-399.

11. See DEVISEES; *Shumate v. Dunbar*, p. 430-431.

12. In a suit in Chancery to recover a tract of land claimed by equitable title, and for other objects, if it appear that some of the defendants are entitled to a moiety of the land, by an equitable title adverse to that of the other defendants; the Court should permit them to unite as plaintiffs in the suit, to claim such moiety. *Christian's devisees v. Christians*, p. 534-541.

13. See JUDGMENTS; *Lane v. Harrison*, p. 573-580.

PRECEDENTS.

1. Adjudged cases can be safely relied on as precedents, only as to points actually in issue between the parties, and not as to such as may be deemed extra-judicial; unless indeed, in relation to the latter, they shall have ripened into law by various and successive decisions. *Lewis & others v. Thornton & Wife*, p. 87-98.

2. Where the principles of a decree of the Court of Appeals seem to be opposed to it's letter, the literal inter-

pretation ought not to be relied on as a binding precedent. *Ibid.*

PRESUMPTIONS.

1. In the case of slaves brought into this State, from any of the United States, before the Act of 1792, the fact of the master's having taken the oath required by law within ten days after removal, should be presumed from twenty years possession of them, as slaves, without their claiming freedom; so that, in such case, the onus probandi in the suit for freedom should be thrown on the plaintiffs: but this presumption may be repelled by circumstances. *Abraham & others v. Matthews*, p. 159.

2. Infancy of any of the slaves, is not conclusive against the presumption; but a circumstance to be considered, the weight and effect of which should be left to the Jury. *Ibid.*

3. In debt on a promissory note, the Court, if requested, ought to instruct the Jury that, twenty years having elapsed between the time when the note became due and the instituting of the suit, they ought to presume it paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest, or part payment of principal, within the twenty years. Nor can the Court be justified in refusing to give such instruction, on the ground that the defendant, in his application, has not stated the evidence given in the cause; or that, in the Court's opinion, the said principle of law does not apply to the case, under the circumstances appearing in proof; for this would be undertaking to judge of the weight of evidence, of which the Jury are the proper judges. *Wells v. Washington's adm'r*, p. 532-533.

PROBAT.

1. Proof by one witness, that on a certain day, in the time of the last sickness of the deceased, and at his habitation, he said it was his wish that a certain person should heir all his property; and, by a second witness, that on another day, during the same sickness, and at the same place, he heard the deceased speak the same words, and was told by him to take notice of what he said; is not sufficient to establish a nuncupative will if the value of the personal property of the deceased exceed thirty dol-

lars. *Weeden v. Bartlett & others*, p. 123-125.

PROFITS.

1. A testator devised to his wife during her natural life, all his lands in one County, with the use of his negroes, stocks, &c. thereon; and desired that all his negroes and stocks in two other Counties, be, the December after his decease, equally divided between his wife and only son; to be kept together and worked on his lands in those Counties, and the profits thereof to be equally divided between his said wife and son.—He devised to his son and his heirs the last mentioned lands, subject to the condition aforesaid, during the life of his mother; and, after sundry small legacies to his other children, devised to his son all the residue of his estate not before disposed of. It was held, that the wife was entitled to an absolute estate in a moiety of the slaves and stocks, and their increase, in the two Counties last mentioned, together with a moiety of the profits made on the said lands the year the testator died; besides a moiety of the subsequent profits as aforesaid. *Bolling v. Robertson & wife*, p. 220-227.

PROMISES.

1. See **BILLS OF EXCHANGE**; *Walker v. Lavery & Gantley*, p. 487-488.

PROMISSORY NOTES.

1. It is generally necessary for the assignee of a promissory note to sue the drawer, in order to charge the indorser; but to this rule there are exceptions; where the plaintiff can shew a discharge of the drawer under the former bankrupt laws of the United States, or the insolvent law of this State, or that the drawer was actually insolvent, so that a suit would have been wholly unavailing. *Brown v. Ross*, p. 391-393.

2. See **PRESUMPTIONS**; *Wells v. Washington's adm'r*, p. 532-533.

3. See **MORTGAGES**; *Colquhoun v. Atkinsons*, p. 550-557.

PURCHASERS.

1. A derivative purchaser with notice, is protected by the want of notice in him under whom he claims. *Curtis v. Luson executor of Jones*, p. 42-45.

2. The ground on which an original

purchaser with notice, is postponed in equity, is, that the taking the legal estate, after notice of a prior purchase or equity, makes the party a *mala fide* purchaser, and amounts to a fraud. In order to fix this fraud, however, the proof of notice must be clear. If it be merely doubtful, a presumption of fraud will not take place. *Ibid*.

3. Though a purchaser of a tract of land agree to pay so much by the acre, yet if he also agree to take it by the Patent or survey already made, as fixing the number of acres in the tract, (without any fraud, concealment or misrepresentation on the part of the Vendor,) he thereby takes upon himself the risk as to quantity; by which he might be gainer or loser; and therefore is not entitled to any compensation for a deficiency. *Fleet v. Hawkins*, p. 188-191.

4. Under the Act of 1792, (ed'n 1794, 1803 and '14, c. 90, § 4,) a mortgage, not recorded within eight months from its date, was void against a bona fide purchaser for valuable consideration, who had no notice thereof when he made the purchase, paid his money and got his deed; notwithstanding he had actual notice before the eight months from the date of the mortgage had expired. *Reeses v. Holliday & Welch*, p. 261-261.

5. If a purchaser to whom a deed has been fully executed, or one claiming under him, put the deed into the hands of the vendor, that he may acknowledge it for the purpose of having it recorded; such delivery is not a surrender of the title under the deed. *Ibid*.

6. See **TRUSTEES**; *Taylor v. King*, p. 358-367.

7. If a vendor of land take a duly recorded mortgage of the land itself, to secure the purchase money; the land mortgaged is liable for the debt, to the full amount thereof, into whose soever hands it may come; and, in the event of its being inadequate, the Vendee's estate is bound to make good the deficiency; but a purchaser from him is not personally liable therefor, without a special agreement to that effect. *Bumgardner & others, v. Allen*, p. 439-447.

8. An agreement between a vendee and a derivative purchaser, that such purchaser shall pay the debt of the vendee to the vendor, for the land, must be understood as subject to the same limitations and exceptions, as if the contract had been to pay the money to the vendee himself. *Ibid*.

9. See LIMITATIONS OF ESTATES; *Self's adm'r v. Tune*, p. 470-472.

10. See PARTIES; *Mayo v. Tomkies*, p. 520-528.

11. See ANNUITIES; *Ibid*.

12. See MORTGAGES; *Ibid*.

R.

RELEASES.

1. Where an obligee covenants not to sue one of two joint and several obligors, (and, much more, where he binds himself not to sue him for a limited time only,) this does not amount to a release, but a covenant only; and he may still sue the other obligor at law. *Ward v. Johnson*, p. 6-9.

2. Upon a motion for a new trial, on the ground that the damages found by the Jury are excessive, if the plaintiff release such part thereof as, in the Court's opinion, ought to be released; and thereupon judgment be entered for the residue; such judgment, not appearing unreasonable, should be sustained by the appellate Court. *Preston v. Bowen*, p. 271-277.

REMAINDERS.

1. A testatrix bequeathed certain slaves "and their increase to her nephew J. A., to him and his heirs forever; but, in case he should die without heir, then and in that case, to be equally divided between her two nieces, M. A. and P. A." This was adjudged a good limitation over, upon J. A.'s dying without issue at the time of his death, to M. A. & P. A. who survived him; on the ground that the devise over to the nieces was, to them merely, and not to them and their heirs; purporting therefore a personal benefit to themselves; which construction was fortified by the words "then and in that case," and "equally to be divided," found in the bequest. *Timberlake & wife v. Graves*, p. 174-175.

2. See SLAVES; *Ellison & others v. Woody & others*, p. 368-373.

3. See LIMITATIONS OF ESTATES; *Self's adm'r v. Tune*, p. 470-472.

RENTS.

1. An action of debt may be brought upon a three month's replevy bond for rent, though it give back-interest from the time when the rent became due, and

not merely from the date of the bond, which circumstance, the Court were inclined to think, makes it not a good bond under the Statute. *Early v. Owen*, p. 319-320.

RETURNS.

1. An amended return, by a Sheriff, upon an execution, stating that a writ of *Supersedeas* was issued on a day specified (being a day previous to that appointed for the sale of the property taken in execution,) that he *thinks* the said Writ was delivered to him on the day of sale; and that the property, for which a forthcoming bond was given, was not delivered at the day and place of sale; is sufficiently precise and certain. *Rucker v. Harrison*, p. 181-184.

2. In this case, the Sheriff was permitted by the Court to amend his return, after a lapse of seven years from its date. *Ibid*.

REVIVOR.

1. Pending a suit against the Committee of an insane person, if the latter die, and a *scire facias* to revive the suit be issued against his administrators, who thereupon appear by counsel, and go to trial on the issue joined between the plaintiffs and the Committee; they can not take an objection, in the appellate Court, that the suit ought not to have been revived against them. *Paradise's adm'r v. Cole & Henderson*, p. 218-219.

2. *Quere*, whether a suit against the Committee of an insane person may not properly be revived against the administrators of such person, in the event of his dying during its pendency? *Ibid*.

ROADS.

1. A partial obstruction of a public highway, is an abateable nuisance.—*Dimmett & others, v. Eskridge*, p. 300-311.

S.

SALES.

1. A person disposed to purchase a tract of land, wrote to the owner, enquiring whether it was for sale, and what were his terms by the acre; stating, also, the payments it would be convenient for him to make; one of which was to

pay \$1000 immediately.—the answer to this letter, stated the price the owner was willing to take, but that he wished the purchaser to take upon himself the responsibility of establishing the lines of the tract:—he also *acceded* to the offered terms of payment, and required the purchaser's answer as soon as possible, in case he was disposed to *accede* to these terms: the purchaser's reply stated, that he would *take the land* on the terms proposed, and would have the lines ascertained; though it went on to express his wish that the owner's agent should attend to the settlement of a part of the boundaries, through motives of delicacy in relation to one of the coterminal tenants; saying nothing, however, of waiving or abandoning his acceptance of the terms proposed. This amounted to a complete and concluded contract for a sale and purchase of the land. *Fitzhugh & Grinnan v. Jones*, p. 83-87.

2. The word "*immediately*," used on this occasion, only meant that the payment should be *prompt*; in contradistinction to a *credit* payment. A tender of the money, therefore, without any unreasonable delay, was sufficient. *Ibid*.

3. An agreement for the sale of land being, that the vendor shall make and execute deeds of conveyance, and the vendee shall pay, *on the day of the execution of the said deeds*, part of the purchase money, and give bonds for the balance, as soon as the quantity, (supposed to be a certain number of acres) can be ascertained by an accurate survey; the vendee is not bound to make the said payment, nor give bonds for the balance, until the vendor shall first have made or tendered the conveyance; notwithstanding a survey ascertaining the quantity of the land has been made. *Spindle's adm'r v. Miller's ex'ors*, p. 170-173.

4. If the terms of the agreement be, that the vendor binds *himself* to make the conveyance, and the vendee binds *himself and his heirs* to make the payment, &c., *on the day of the execution of the conveyance; and no conveyance be made or tendered by the vendor in his lifetime*; the vendee is not bound to accept the conveyance from his *heirs*, but may waive the contract altogether. *Ibid*.

5. If a proprietor of slaves deliver them to another, who thereupon claims them, *as sold*; any declaration made by the former, *after such delivery of possession*,

and not in the presence of the latter, are not admissible as evidence in opposition to such claim. *Given v. Mann*, p. 191-202.

6. In the sale of a lease of a house and tenement in a town, if the vendor fail to shew the lease to the vendee, and do not inform him of a covenant therein, that, in case of destruction of the house by fire, the lease shall terminate and become void; this is such a concealment as vitiates the contract; and if the house be destroyed by fire in a short time, Equity will relieve the vendee by injoining the vendor from collecting the purchase money, and by directing his notes for the same to be given up and cancelled. *Snelson & Co. v. Franklin*, p. 210-212.

7. If parties negotiating for the sale of a tract of land, agree, in writing, upon a specified price per acre; but that the vendor shall take, in payment, a house and lot of the vendee, *at cash value, to be pronounced by two persons, (not naming them;)* or the money by certain instalments, *in case the vendee shall prefer paying money*; and, afterwards, (the vendee not having elected to pay money for the land,) the parties, by endorsement on the writing, appoint two persons to value the house and lot, who attempt to do so, but differ in opinion; whereupon they verbally agree to make another appointment, at some other time *not specified*: the contract is too incomplete to be enforced by a Court of Equity. *Baker v. Glass*, p. 212-218.

8. The vendor of a slave gave a bond to the buyer, with a condition, reciting that, whereas he had sold him a slave for a certain sum of money, if therefore the buyer should pay the said sum, and another sum annually for hire of the said slave, until he should pay the said purchase money, which he might do *at any time*, (when the said hire should cease,) then the vendor should *convey to him a lawful right and title* to the said slave; which title in the mean time should remain in the vendor. The buyer was not entitled, under this bond, to the possession and property of the slave, but the vendor could recover in detinue. *Erwine v. Dotson*, p. 231-232.

9. The land of *H.* being about to be sold for debt, at public auction for ready money, it was agreed, between him and *J.*, that *J.* should bid to the amount of the debt; and that, if the land should thereupon be strick off to him, he should *re-sell it to H.*, for a sum thereafter

to be agreed on; provided the same should be paid within twelve months. The land was accordingly struck off, and conveyed to J., for much less than its cash value. He died before the end of the twelve months, without having agreed on the sum to be paid for purchasing the land. Upon a bill in Equity exhibited by his representatives, it was decided, that the contract be rescinded, on making just compensation; the measure of which was the sum paid by J. for the land, with lawful interest. *Jones v. Hubbard's representatives*, p. 261-264.

10. Upon a bill filed by an executor against the devisees and legatees, for settlement of his administration account, and for a decree compelling the devisees to convey a tract of land, sold by the plaintiff with their consent, it is error to decree, against the executor, a balance due upon his administration account, without directing such conveyance to be made by the devisees to the purchaser; notwithstanding he, being a defendant, failed to answer the bill; it appearing in evidence that he paid the purchase money, and the devisees by their answers having declared their willingness to make the conveyance. *Machir's ex'ors v. Machir's devisees*, p. 265-267.

11. A contract for sale of land, rescinded in equity, on the ground that both parties were mistaken, as to the situation and other circumstances materially affecting the value of the land. *Chamberlaine & others v. Marsh's adm'rs*, p. 283-287.

12. A sale and conveyance of land by a trustee, can not be set aside on the ground that he was an Alien when the deed was made to him, and when he conveyed the land to the purchaser. *Ferguson v. Franklin*, p. 305-306.

13. If a tract of land, being advertised to be sold on the premises, be sold, not immediately on the premises, but within eighty yards of the dwelling-house, within full view of it, and about fifteen or twenty yards from the boundary line; it being believed by some present that they were on the premises; such sale, being regular in other respects, and no fraud appearing, is not to be set aside. *Ibid*.

14. See TRUSTEES; *Taylor v. King*, p. 358-367; and *Harris v. Harris*, p. 367-368.

15. A Court of Equity will not permit the original owner of the land, or his alienee, to be injured by a breach of

trust on the part of the trustee; and, therefore, will set aside a sale and conveyance by him, if the requisitions of the deed of trust have not been complied with. *Taylor v. King*, p. 358-367.

16. See PARTNERSHIP; *Poindexter v. Waddy*, p. 418-422.

17. It seems, that, where the annual rent of land descended, is more than sufficient to pay the interest accruing on a bond debt of the ancestor, a Court of Equity will not decree a sale of such land, in possession of his heirs, to satisfy the debt; the land being not subject to any specific lien, or incumbrance, in favour of the creditor. *Wilder's v. Chambliss's adm'x & heirs*, p. 432-433.

18. A sale of Bank Stock at whatever price, is not usurious; unless the object be to borrow money at more than lawful interest, and not to purchase stock, and the price of the stock be graduated as a device to effect that object; or there be a combination between the seller of the stock on credit, and a person to whom the buyer sells it for cash, in either of which cases, the transaction becomes usurious. *Greenhow's adm'x v. Harris*, p. 472-484.

19. *Quere*, whether it be regular, in a decree for sale of mortgaged premises, to direct the proceeds of such sale to be paid over to the plaintiff, before the sale shall have been confirmed by the Court? *Anderson's adm'r v. Davies's adm'r*, p. 484-486.

20. Where lands devised to be sold, have been sold by one of several executors, all the executors ought to be parties to a suit to foreclose a mortgage previously existing on those lands. *Mayo v. Tomkies*, p. 520-528.

SCIRE FACIAS.

1. The right to issue a *scire facias* upon a judgment, is not barred by the Act of Limitations, in a case where execution was issued in due time, and returned "no effects," though more than ten years elapsed between the return of the execution, and date of the *scire facias*. *Gee v. Hamilton & wife*, p. 32-33.

2. Upon a *scire facias* against heirs and devisees to revive a judgment, if one of the defendants confess the plaintiff's right to revive the judgment in the *scire facias* mentioned, and thereupon judgment be entered, against him, that the plaintiff have execution for the whole tract of land in question; there is no error in such judgment, of which he

can take advantage. *Jones v. Doe lessee of Carter*, p. 105.

3. Upon a *scire facias* to revive a judgment, in debt, for a penal sum, to be discharged by principal and interest; if the defendant confess judgment according to the *scire facias*, the plaintiff is not entitled to a writ of enquiry of damages, to recover more than the penal sum; (the principal and interest accruing by lapse of time, amounting to more;) but must take execution upon the original judgment, with the addition, only, of the costs upon the *sci. fa.* *Cosby's ex'ors v. Bell's adm'r*, p. 282-283.

SEARCH WARRANTS.

1. Trespass *vi et armis*, and not case, is the proper action, against a Justice of the peace, for maliciously and corruptly, with intent to injure and oppress, and without probable cause, issuing a search warrant, by virtue whereof a constable forcibly enters the plaintiff's close, and takes and carries away from his possession certain slaves which he held as his property. *Muse ex'or of Hefferum v. Vidal*, p. 27-29.

2. The form of the declaration in such action. *Ibid.*

SEISIN.

1. Before the 1st of January 1787, (when the Act of Descents took effect,) if a person entitled to a reversion in fee, expectant upon an estate for life, died in the lifetime of the tenant for life, such person never had *seisin* of the inheritance, and therefore could not transmit it to his heir; but the heir of the person last actually seized was entitled. *Dickenson & others v. Holloway*, p. 422-425.

2. A testator who died in the year 1781, devised a tract of land to his wife for life, and at her death to be equally divided among his three sons and their heirs. The eldest son died before the 1st of January 1787, intestate, and without issue; and the widow died after that day. At her death, the second son was entitled to one third of the land in his own right, and to the whole of another third as heir to his father, who was the person last actually seized of the freehold and inheritance. *Blankenbeker v. Blankenbeker*, p. 427-428.

SET OFFS.

1. Although a person having a claim against a mercantile Company, can not set off such claim, against a debt from himself to one of the partners; yet it is competent for him to charge that partner, in equity, (in extinguishment of the said debt,) for so much of the surplus of the partnership property, as may be due to such partner on a settlement of the partnership accounts; for the purpose of which settlement, and also for that of ascertaining and adjusting his own claim against the company, all the partners should be made defendants to his Bill. *Dunbar v. Buck*, p. 34-36.

2. In debt on a joint obligation, to which the defendants plead payment, they cannot give in evidence a Covenant between one of the plaintiffs and one of the defendants, with parol testimony that the plaintiffs settled with that defendant, who was the principal debtor, and, in such settlement, kept their accounts separately; that each was entitled to one moiety of the debt; that the defendants gave notice that a discount would be claimed by them on account of said covenant; and that the plaintiff, who was party to the covenant, said that the same was not settled, and that he intended to allow a credit for it. *Arnolds v. Jacksons*, p. 106-107.

SHERIFFS.

1. A Bond from the deputy to the High Sheriff, conditioned for the faithful performance of his duty as deputy, "during his continuance in office," without specifying the length of time, is binding on him and his sureties for the transactions of one year only. *Munford v. Rice*, p. 81-83.

2. If an official bond, given by a Sheriff and his sureties, before the Act of 1786, be so worded, as not to be joint and several, but joint only; a Court of Chancery is the proper tribunal to give the sureties relief, against the estate of the Sheriff after his death; upon their being compelled to pay a sum of money for the delinquency of such Sheriff in his lifetime. *Mormijoy & Triplett v. Banks's ex'or & devisees*, p. 387-389.

3. The deputy of a Sheriff to whom administration of the estate of a deceased person has been committed, is not

authorised to submit to arbitration a suit revived in the name of the Sheriff as administrator, to which the deceased, in his lifetime, was a party. *Thompson's adm'r v. Thompson's ex'or*, p. 514-519.

4. Not more than *one fine* can legally be imposed on the sheriff, or other officer, for failing to return *one* execution. *Tomkies' Executor v. Downman*, p. 557-573.

5. The plaintiff at law having recovered, by successive judgments, *many* fines, against the sheriff for failing to return *one* execution; to a greater amount, in all, than the execution itself, *with his extra costs added thereto*; it appearing, also, that the execution was lost, and therefore could not be returned; that the sheriff's failing to make defence at law against any of the judgments after the first, proceeded from ignorance of the true construction of the Act of Assembly; and that, in relation thereto, there was a general delusion among the citizens of the Commonwealth; the Court of Equity gave the sheriff relief, by Injunction, prohibiting any farther recovery against him on account of his failure to return the said execution; and this, although it appeared he had received and applied to his own use a part, and probably the whole, of the money upon the execution. *Ibid.*

6. See BREACH; *Lane v. Harrison*, p. 573-580.

7. *It seems*, that, where a high sheriff has given the bonds and taken the oaths required by law, when he originally qualified; and, before his first year of service expires, is continued in office for the second year by a commission from the Executive, and thereupon gives new bonds; it is not incumbent upon him to shew, in an action against his deputy, *that he a second time took the oaths of office*. *Ibid.*

8. Where the high sheriff is continued in office the second year, and takes a new bond of his deputy, (who is also continued,) for faithful performance of the duties of his office; *it seems* that, in an action upon such bond, the plaintiff is not bound to shew that the deputy took the oaths of office a second time, or that his appointment was approved by the County Court. *Ibid.*

SLANDER.

1. In an action of slander, for charging the plaintiff with perjury in a judi-

cial proceeding; the defendant on the plea of *not guilty*, (though not permitted to prove the *falsity* of the words sworn by the plaintiff,) may prove *what those words were*, in mitigation of damages. *Grant v. Hover*, p. 13-15.

2. In an action for words, proof of circumstances of suspicion, not amounting to full justification, is not admissible, in mitigation of damages, on the plea of *not guilty*. *McAlexander v. Harris*, p. 465-469.

3. Proof of parol declarations by the defendant, *after the institution of the suit for slander*, that he did not mean to charge the plaintiff with the crime alleged by the slanderous words, or that the words were spoken in heat of passion, is not admissible in his favour. *Ibid.*

4. The defendant in the action of slander, is not to be permitted to prove the general character of the plaintiff as an insulting, provoking and quarrelsome man; nor that, *before* the speaking of the slanderous words, the plaintiff was in the habit of vilifying, insulting and provoking him and his family. *Ibid.*

SLAVES.

1. The 2d section of the Act of 1792, concerning slaves, extends only to slaves brought into this Commonwealth by the absolute owner of them, and not to such as are brought in by wrongdoers, or by persons having only a limited interest in them. *South v. Solomon & others*, p. 12-13.

2. The Court will not give such a construction to the general words of an Act, as would subject the property of innocent individuals to loss by the acts of third persons; nor such as would favour a *partial* emancipation during the interest of a particular tenant of slaves. *Ibid.*

3. A testator, in the year 1790, bequeathed his slaves severally to his children, with a proviso, "*that none of them be sold out of the families to whom devised; that, if offered for sale by any of them, out of the family of his wife, his daughter and sons, they be immediately liberated.*" A son of the testator to whom a female slave was bequeathed, being in possession by virtue of the bequest, died intestate, and she came into the possession of a *grand-daughter*, by whose husband, a child of the said slave was sold to a *stranger*, to be carried out

of Virginia. It was decided that a right to freedom did not thereby accrue. *Peggy & Mary v. Legg*, p. 229-231.

4. In the case of slaves brought into this State, from any of the United States, before the Act of 1792, the fact of the master's having taken the oath required by law within ten days after removal, should be presumed from twenty years possession of them, as slaves, without their claiming freedom; so that, in such case, the *onus probandi* in the suit for freedom should be thrown on the plaintiffs: but this presumption may be repelled by circumstances. *Abraham & others v. Matthews*, p. 159.

5. Infancy of any of the slaves is not conclusive against the presumption; but a circumstance to be considered, the weight and effect of which should be left to the Jury. *Ibid.*

6. *Quere*, whether a deed of emancipation from a person having the right to slaves, of whom another has adverse possession at the time, be competent to confer a right to freedom? *Givens v. Manne*, p. 191-202.

7. A deed of emancipation can have no effect, if made by a person out of possession; another holding the slaves by a title adverse to his; and the possession of such other person having continued for five years before the execution of such deed. *Ibid.*

8. In a devise of a plantation and the slaves upon it, to trustees, for the support of a son of the testator, and of the wife and children of that son, by means of the profits thereof; *quere*, whether the testator's omitting to insert the names of the slaves, or to describe them in any other manner than as the slaves on the said tract of land, be such a circumstance as would subject them to the claims of creditors? *Galt & Garland v. Carter*, p. 245-250.

9. If a testator bequeath a female slave to his wife for life, and then, absolutely, to one of his sons; saying nothing expressly or by evident implication, of her increase; such increase, born after the death of the testator, and during the life of the widow, do not pass by a general residuary clause to all the children, but belong to the remainder-man:—but such as are born before the testator's death, and not otherwise disposed of by the Will, do pass by such residuary clause. *Ellison & others v. Woody & others*, p. 368-373.

10. Under a bequest to a daughter of the testator, of the first child a cer-

tain negro woman shall raise, the legatee is entitled, not to the first child born after the death of the testator, and there-after raised, but to the first child that shall be raised, whether born before or after the testator's death. *Ibid.*

11. See LIMITATIONS OF ESTATES; *Self's adm'r v. Tune*, p. 470-472.

12. A mortgagee of lands and slaves, can not be compelled to resort to a sale of the slaves before he shall disturb the possession of bona fide purchasers of the lands from the mortgagor:—but the decree against such purchasers ought to permit them, after satisfying the claim of the mortgagee, to seek indemnity out of the mortgaged slaves, or the estate of the mortgagor, or any other person liable to such demand, so far as the mortgagees might be able to charge such party, or otherwise. *Mayo v. Tomblin*, p. 520-528.

SPECIFIC PERFORMANCE.

1. In the year 1775, J. Z. made a settlement on the upper part of an Island in the Ohio River, containing in all 285 acres. In 1777, his brother E. Z. made a settlement on the lower part. A parol agreement between them, in or before the year 1784, that E. Z. should exhibit his settlement right, to the Land Commissioners, obtain their certificate, and get a Patent to himself for the whole Island, and afterwards convey to J. Z. in fee simple his part thereof, situate above certain line trees, was enforced in Equity, upon a bill filed in 1815 by J. Z., whose possession of the land had continued without interruption from the time of his first settlement. *Zane's devisee v. Zane*, p. 406-417.

STOCK.

1. See SALES; *Greenhow's adm'r. v. Harris*, p. 472-484.

SUBMISSION TO ARBITRATION.

1. If, after great delay in executing an order of reference made *pendente lite*, the Court set it aside, on motion of one of the parties, without any previous notice or rule to shew cause; but it do not appear, by a bill of exceptions, or otherwise, that any step had been taken to carry such order of reference into effect; after which a fair trial is had, and judgment entered accordingly; such judgment ought to be affirmed. *Arnolds v. Jackson*, p. 106-107.

2. Although infants are bound by judgments had under the superintendence and protection of the Court; yet, where the case is referred to arbitrators, whereby they are deprived of that protection, a submission, even by rule of Court, ought not to be sanctioned; *even though the award be in their favour.*—For, as awards are in the nature of judgments, and are final and conclusive; which can not be where one party has a right to avoid them; it follows that a submission by infants, although with adults, can not be obligatory on either party.—*Britton v. Williams's devisees*, p. 453-454.

3. The deputy of a Sheriff to whom administration of the estate of a deceased person has been committed, is not authorised to submit to arbitration a suit revived in the name of the Sheriff as administrator, to which the deceased, in his life time, was a party. *Thompson's adm'r v. Thompson's ex'or*, p. 514-519.

SUPERSEDEAS.

1. If a *supersedeas* to a Judgment, (execution being levied, and a forthcoming bond taken,) be issued before the day of sale; and thereupon, the property be not forthcoming; the penalty of the bond is saved, and no motion lies upon it.—*Rucker v. Harrison*, p. 181-184.

2. It seems, too, that, if the property taken in execution be in the Sheriff's hands at the time of his receiving the *Supersedeas*, or be delivered to him on the day of sale, after his receiving such Writ, he ought to restore it to the owner. *Ibid.*

3. An amended return, by a Sheriff, upon an execution, stating that a writ of *Supersedeas* was issued on a day specified, (being a day previous to that appointed for the sale of the property taken in execution,) that he *thinks* the said Writ was delivered to him on the day of sale; and that the property, for which a forthcoming bond was given, was not delivered at the day and place of sale; is sufficiently precise and certain. *Ibid.*

4. The Superior Courts of law have jurisdiction to grant Writs of *Supersedeas* to orders of the County or Corporation Courts, binding persons, accused of being the fathers of bastard children, to support such children; and the Court of Appeals, in like manner, has jurisdiction to correct errors in the decisions of the Superior Courts of law on the

same subject. *Mann v. the Commonwealth*, p. 452-453.

SURETIES.

1. The majority of the Court were inclined to think that a surety is exonerated in equity, though not at law, by the plaintiff's accepting a confession of Judgment from the principal, and covenanting thereupon to grant him a stay of execution for a limited time; the surety not having assented to such new contract and compromise. *Ward v. Johnson*, p. 6-9.

2. A creditor having obtained judgment, against the executors of the surety, for the debt, is not bound to take out execution, before he can file his Bill in Equity, for an account of the personal and real estates of the principal and surety, and to get satisfaction out of the real, in default of the personal assets. *Duval's executor v. Trent's devisees & others*, p. 29-31.

3. Under what circumstances, such Bill may be filed. *Ibid.*

4. A devisee of nearly all the estate of a principal debtor, gave a bond to indemnify the estate of the surety against the debt; in which bond one of the executors of the surety bound himself, in his individual character, as surety for the said devisee. The creditor, afterwards, obtained a judgment, in the Federal Court, against the said executors; one of whom, (viz, the same who was co-obligor in the bond of indemnity,) paid off the Judgment. The said bond being in the possession of one of the obligees, who resided out of the State, and refused to let them have it, the Executors brought a suit in Chancery, against the said devisee, (the plaintiffs and defendants being all citizens and residents of this State;) to recover of him the money so paid; and the Court's jurisdiction was sustained. *Cabell's ex'ors v. Megginson's adm'r*, p. 202-207.

5. It seems, that, if a judgment be rendered, in a Federal Court, against the executors of a surety, and they pay the money; they can not recover it against a devisee of the principal debtor, by motion, or any action at common law, in the General Court, or any other Court of law of this Commonwealth. *Cabell's ex'ors v. Megginson's adm'rs*, p. 202-207.

6. See SHERIFFS; *Mountjoy & Triplett v. Banks's ex'or & devisees*, p. 387-389.

SURVEYORS.

1. In an action against the Surveyor of a County, for refusing to furnish copies of certain surveys of land, which the plaintiff wished to enter as waste and unappropriated; the Court, on the plaintiff's motion, instructed the jury, "that, the surveys in question having been made in May 1774, the land was liable to be entered as vacant land in December 1809, unless they were returned to the Land Office; but that the plaintiff was not bound to shew that they were not returned to the land office in due time:"—and this instruction was not considered erroneous by the Court of Appeals. *Preston v. Bowen*, p. 271-277.

2. It is part of the official duty of the surveyor of a County, to furnish in reasonable time, when demanded, copies of all surveys, not specially excepted in the land law. *Ibid*.

3. A special action on the case lies against the surveyor of a County, for fraudulently refusing to furnish Copies of surveys, when lawfully demanded, and thereby enabling a third person to locate the lands, therein described, before the plaintiff. *Ibid*.

4. Where the declaration charges that the defendant, contrary to his official duty, refused to furnish copies of certain surveys, when demanded by the plaintiff; if the defendant be excused by any provision in the land law, from furnishing the copies so demanded, he ought to plead it specially. *Ibid*.

TITLE.

1. See TRUSTEES; *Taylor v. King*, p. 358-367; and *Harris v. Harris*, p. 367-368.

TRESPASS.

1. Trespass *vi et armis*, and not case, is the proper action, against a Justice of the peace, for maliciously and corruptly, with intent to injure and oppress, and without probable cause, issuing a Search Warrant, by virtue whereof a Constable forcibly enters the plaintiff's close, and takes and carries away from his possession certain slaves which he held as his property. *Muse ex'or of Heffernan v. Vidal*, p. 27-29.

2. The form of the declaration in such action. *Ibid*.

3. Case for malicious prosecution, and not trespass *vi et armis* is the proper action against a person who, maliciously and without probable cause, sues out an attachment, and causes it to be levied on the property of another. *Shaver v. White & Dougherty*, p. 110-114.

4. In trespass for destroying a mill dam, erected by the plaintiff, who gives in evidence the transcript of an inquisition upon a writ of *ad quod damnum*, the Court, on the defendant's motion, ought to instruct the Jury that it was incumbent upon the plaintiff to erect his dam in the position prescribed in the said inquisition; and, if they be satisfied that the said dam was erected in a different position, in consequence whereof a ford across the stream, being part of a public road, legally established, was obstructed and shut up, that such dam was a public nuisance, and abatable by the defendants. *Dimmett and others v. Eskridge*, p. 308-311.

5. It seems, that, in trespass *vi et armis*, a declaration charging, by way of aggravation of damages, a special pecuniary loss occasioned by the trespass, was good after verdict, even before the Act of Jeofails which took effect Jan, 1st, 1820. *Ibid*.

TRIAL.

1. If, after a great delay in executing an order of reference made *pendente lite*, the Court set it aside, on motion of one of the parties, without any previous notice or rule to shew cause; but it do not appear, by a bill of exceptions, or otherwise, that any step had been taken to carry such order of reference into effect; after which, a fair trial is had, and judgment entered accordingly; such judgment ought to be affirmed.—*Arnolds v. Jackson*, p. 106-107.

2. Pending a suit against the Committee of an insane person, if the latter die, and a *scire facias* to revive the suit be issued against his administrators, who thereupon appear by counsel, and go to trial on the issue joined between the plaintiffs and the Committee; they can not take an objection in the appellate Court, that the suit ought not to have been revived against them. *Paradise's administrators v. Cole & Henderson*, p. 218-219.

TRUSTEES.

1. Under the particular circumstances of this case, no interest was permitted to be charged against a trustee on the monies from time to time in his hands; and no commissions were allowed him for his trouble; but, on closing his accounts, interest was allowed on a balance in his favour. *Beverleys v. Miller*, p. 99-104.

2. A charge by a trustee, for articles sold, and cash lent, *before the creation of the trust*, ought not to be allowed, without proof thereof by *disinterested testimony*. *Ibid*.

3. It appears, from the decree in this case, that the points decided by Chancellor TAZON, concerning the evidence requisite to prove disbursements by a trustee, in execution of the trust, and as to disbursements made without the consent of co-trustees, were affirmed by the Court of Appeals. *Ibid*.

4. A sale and conveyance of land by a trustee, can not be set aside on the ground that he was an *Alien* when the deed was made to him, and when he conveyed the land to the purchaser.—*Ferguson v. Franklins*, 305-306.

5. The Trustee in a Deed of Trust takes a *legal*, tho' defeasible title; and a Deed from him to a purchaser, conveys an *absolute title*, in a Court of common law; whether the conditions of the Trust Deed have been complied with, or not; but the rule is different *in equity*. *Taylor v. King*, p. 358-367; and *Harris v. Harris*, p. 367-368.

6. A Court of *Equity* will not permit the original owner of the land, or his alienee, to be injured by a breach of trust on the part of the trustee; and, therefore, will set aside a sale and conveyance by him, if the requisitions of the Deed of Trust have not been complied with. *Taylor v. King*, p. 358-367.

7. A purchaser from a person, who has *previously* conveyed the estate to a trustee by deed duly recorded, is estopped *at law*, tho' *not in equity*, from impugning, on the ground of *fraud*, a deed regularly executed by the trustee to a purchaser from him. *Ibid*.

TRUSTS.

1. A *cestuy que trust*, after the purposes of the deed have been satisfied, may maintain Ejectment, upon a demise in his own name, altho' the legal

estate is still in the trustee. *Hopkins & Watson v. Ward*, p. 38-41.

2. It seems, that property conveyed, by deed of marriage settlement, in trust, that the husband and wife shall be permitted, *during their joint lives*, to enjoy the profits, may be taken in execution to satisfy a debt, incurred *after* the marriage, for supplies furnished for the proper support of the husband and wife. *Scott and wife v. Larnie and others*, p. 117-119.

3. In a devise of a plantation and the slaves upon it, to trustees for the support of a son of the testator, and of the wife and children of that son, by means of the profits thereof; *quare*, whether the testator's omitting to insert the names of the slaves, or to describe them in any other manner than as the slaves on the said tract of land, be such a circumstance as would subject them to the claims of creditors? *Gals and Garland v. Carter*, 245-250.

4. Upon a bill of Injunction to prevent the sale, under execution, of slaves devised in trust, if the defendants alleged that the *cestuy que trust* was entitled to the slaves by five years possession before the death of the devisor; and the truth of such allegation be *doubtful* on the evidence; the Chancellor ought to direct an issue to ascertain that fact. *Ibid*.

5. If the powers of trustees suing in Chancery be vacated pending the suit, upon a bill filed against them by their *cestuy que trust*: and other trustees be appointed; it seems, that the Court may *change the plaintiffs after answer filed*, upon terms, of the new trustees paying the costs already incurred and giving security for future costs; but it can not vacate an Injunction bond given by the original trustees, and direct another to be executed, without previous notice to the defendants, that they may shew cause against the motion. *Ibid*.

6. The circumstance that slaves are bequeathed to trustees, for the use of a person, that he may enjoy the profits of their labour during his life, &c., is not, in itself, sufficient evidence that by virtue of such bequest he had *actual possession* thereof, *adversely* to the claim of other persons. *Hudsons v. Hudson's administrator*, p. 352-357.

7. If, by a deed of marriage settlement, property be conveyed in trust, to be invested in "*bank stocks, or freehold lands or ten,*" the trustee is not thereby authorised to make the invest-

ment in *United States six per cent stock. Banister & wife v. McKenzie*, p. 447—448.

8. A provision in a Will, that the money arising from the sale of the testator's personal property, after payment of his just debts, shall be applied to certain purposes, does not create a trust for the payment of the debts, nor take any debt out of the operation of the Act of Limitations. *Brown's administrator v. Griffiths*, p. 450—452.

U.

USURY.

1. The case of *Pollard v. Bayler's devisees*, 4 H. & M. 223—241, over-ruled. A penalty, inserted in a contract, from which the party may deliver himself, does not make such contract usurious; and the law is the same where it is in the power of the party, by a compliance with his contract, to convert the penalty into a compensation for services rendered him by the other party. *Pollard v. Baylors & others*, p. 433—439.

2. A creditor, being a commission merchant, may justly connect with a contract, by which he grants indulgence to his debtor, a stipulation that he shall be allowed the usual commission, according to the course of trade, for selling tobacco, to be shipped to him by such debtor in payment; and, if it be agreed, that such commission shall be allowed in the event of the debtor's failing to ship the tobacco, such agreement is not usurious; for it is competent to the debtor to bind himself to ship it, and agree to pay the commission, as damages for failing to comply with that stipulation. *Ibid*.

3. The question whether a contract is usurious, or not, is to be decided, with reference to the time when it was entered into; for a contract legal at that time, cannot be made usuriously subsequent events. *Ibid*.

4. A sale of Bank Stock at whatever price, is not usurious; unless the object be to borrow money at more than lawful interest, and not to purchase stock; and the price of the stock be graduated as a device to effect that object; or there be a combination between the seller of the stock on credit, and a person to whom the buyer sells it for cash; in either of which cases, the transaction becomes usurious. *Greenhow's adm'r v. Harris*, p. 472—484.

5. If it be alledged, in a bill of Injunction to prevent a sale under certain deeds of trust, that a previous loan was usuriously made, upon a note at twelve months secured by another deed; and that one of the deeds aforesaid was made only as a kind of indulgence on that note, and to close some other transactions of a like nature; and the defendant, by his answer, deny all charges of Usury, and aver that he made no loan, but bought the note fairly in the market, without knowing the consideration for which it was given, (setting forth at what price,) upon condition that "the holder" would get it secured, which was done; that it had long since been discharged, and had no connection with the deeds of trust enjoined; it seems, that the injunction, being unsupported by evidence on the part of the plaintiff, ought to be dissolved; notwithstanding the defendant evades disclosing the name of the holder, of whom he bought the note at a large discount. *Ibid*.

6. A charge of Usury being explicitly denied by the defendant's answer, the plaintiff has not a right to an order requiring him to produce his books and papers for the purpose of establishing such charge. *Ibid*.

7. A creditor, by threatening to have execution levied, induced the debtor to allow him fifteen per centum per annum upon the debt, and to give a bond as principal obligor, in which the creditor joined as surety, payable at a future day, to a third person to whom the amount was bona fide due, and who knew nothing of such usurious agreement. The debtor was entitled to no relief in equity against such innocent third person; not even by a decree to compel the usurer to pay him the debt, in discharge of the complainant. *Stone v. Ware & Smith*, p. 541—550.

8. The usurious arrangement being proved; and the bill not exhibited for a discovery; the Court gave relief against the usurer, upon the terms of the debtor's paying him the principal justly due, with legal interest. *Ibid*.

9. The circumstance that the amount of the usurious gain was less than one hundred and fifty dollars, and that relief ought to be given to that extent only, was not considered, on an appeal from a Superior Court of Chancery, as furnishing a valid objection to the jurisdiction of the Court of Appeals; the subject in controversy upon the appeal being the whole debt and interest, which

amounted to more than one hundred and fifty dollars. *Ibid.*

10. A sum allowed a creditor, "for services rendered and settled, (but not specified,) amounting to nine per centum per annum, was considered usurious; it appearing that the pretended services were rendered, only in exertions to secure the debt for the creditor's own benefit. *Ibid.*

V.

VARIANCE.

1. If the claim of the plaintiff, in an attachment against an absconding debtor, be stated as for a certain sum, due by negotiable note, with interest from the day when such note should have been paid; and the bond for prosecuting the attachment describe it, as sued out for the sum of money mentioned therein; (saying nothing of interest;) the variance is not material. *Smith v. Pearce*, p. 585-587.

VERDICTS.

1. A verdict in Ejectment, finding for the plaintiff, in general terms, a certain "number of acres part of the premises" "in the declaration mentioned," without designating the boundaries of such part, or referring to some certain standard to supply such defect, is too uncertain to warrant a judgment upon it. *Gregory v. Jackson*, p. 25-27.

2. It seems, that a verdict for a certain sum of money, with interest from a day specified, "subject to a credit," (without saying on what day such credit is to be applied,) is not so uncertain as that the plaintiff can not take judgment upon it. *Lanier v. Harwell*, p. 79-81.

3. A judgment in such case, for the damages aforesaid in form aforesaid assessed, sufficiently follows the verdict. *Ibid.*

4. Issue being joined on a plea that a bond was obtained by fraud, a verdict, "for the defendant, because the jury believe the bond was obtained by fraudulent means," is sufficiently positive and certain. *Chew ex'or of Wormeley v. Moffet & wife*, p. 120-123.

5. Upon a bill of injunction filed, a new trial at law was granted; a verdict was found for the complainant, but certified by the Judge to be against the weight of evidence; another trial being directed, a second verdict was found as

before; whereupon the Judge certified, with the verdict, all the evidence given to the jury; from which it clearly appeared that the merits of the case were against the complainant. The Court of Appeals, thereupon, did not award another trial, but dissolved the injunction, and dismissed the bill with costs. *Ruffners v. Barrett*, p. 207-209.

6. It is not error for the Court to refuse to instruct the Jury, after being sworn, and before evidence introduced, to render a special verdict. *Woodward v. Woodson's heirs*, p. 227-229.

7. A special verdict in Ejectment set aside, for not finding the time of the death of a person, under whom the lessors of the plaintiff might or might not have been entitled to the land in controversy; their title depending upon the time when he died, which, from the circumstances disclosed in the verdict, probably could have been found by the jury; also, for not finding whether the defendant, or those under whom he claimed, had or had not such possession of the land as would be sufficient for his defence, in that action, whatever might be the state of the title. *Cropper v. Carlton & wife*, p. 277-280.

W.

WARRANTY.

1. See EVIDENCE; *Bemgardner and others v. Allen*, p. 439-447.

WASTE.

1. The law of Waste, in its application here, must be varied and accommodated to the circumstances of our new and unsettled country. *Findlay v. Smith & wife*, p. 134-155.

WILLS.

1. A testator, by his Will, lent certain slaves to his daughter Betty L. during her natural life; and, "immediately after her death," he gave the said slaves and their increase, to her children then living, and to the legal representatives of such of them as should be dead; "but, in case all her children should die in the lifetime of her husband James L., then the said slaves to go to him." James L. died after the testator, in the lifetime of Betty L., and bequeathed all his slaves to children of his by a former wife. Betty L. married

again, and had other children, who, together with a child of her's by James L., were living at the time of her death. It was determined that her children by the second husband, were, equally with that child, entitled to the slaves bequeathed to her as aforesaid. *Coleman v. Holladay*, p. 47-61.

2. In supplying words in a Will, it is the most correct course to supply such only as it is *evident* the testator intended to use, and not such, *also*, as would be necessary to *effectuate* the supposed intention of the testator. *Lynch & wife v. Hill & wife*, p. 114-116.

3. Proof by *one* witness, that, on a certain day, in the time of the last sickness of the deceased, and at his habitation, he said it was his *wish* that a certain person should heir all his property: and, by a *second* witness, that, on *another* day during the same sickness, and at the same place, he heard the deceased speak the same words, and was told by him to *take notice of what he said*, is not sufficient to establish a nuncupative will, if the value of the personal property of the deceased exceed thirty dollars. *Weeden v. Bartlett & others*, p. 123-125.

4. A testator directing a tract of land to be sold, *when the time is out for which it is leased*, and the money to be divided between certain children of his, to them and their heirs forever; the legacy does not lapse by the death of any of them after that of the testator, and before the expiration of the lease, but is a vested interest, and belongs to their legal representatives. *Selby & wife v. Morgan's ex'or*, p. 156-157.

5. If a testator bequeath a female slave to his wife for life, and then, absolutely, to one of his sons; *saying nothing, expressly or by evident implication, of her increase*; such increase, *born after the death of the testator, and during the life of the widow*, do not pass by a general residuary clause to all the children, but belong to the remainder-man:—but such as are born *before the testator's death*, and not otherwise disposed of by the Will, do pass by such residuary clause. *Ellison & others v. Woody & others*, p. 368-373.

6. Under a bequest to a daughter of the testator, of the first child a certain negro woman shall *raise*, the legatee is entitled, not to the first child *born after the death of the testator, and thereafter raised*, but to the first child that shall

be raised, *whether born before or after the testator's death*. *Ibid*.

7. If a testator give to one of his children a pecuniary legacy; expressly declaring *that sum to be all he intends* such legatee to receive of his estate; a general residuary bequest, to "*all his children*," (without mentioning names,) must be construed as not including that child. *Ibid*.

8. A testator vested in his executors his whole estate, "*to be by them divided, among his heirs, from time to time, as they might think most conducive to the interest of his estate and family*." By another clause, he empowered them to *sell* his landed interests in a certain undivided estate, and in the State of Kentucky. According to the true construction of this Will, his Executors were empowered to *divide* his other lands, and his slaves, among his heirs; but *not to sell them, nor to make an unequal division*; nor to give certain *classes* of the property to some of the devisees, and others to others. *Carrington's ex'ors v. Belt & wife*, p. 374-377.

9. In a doubtful case, the Court should lean against a construction, which, in effect, would leave the *daughters* destitute of a *permanent* provision, by giving them *personal*, instead of *real* property. *Ibid*.

10. In the case stated, although the words giving power to divide the estate, "*from time to time*," &c., are very extensive, the Court should rather consider them as authorising the executors, *under circumstances*, to deliver the property to the devisees *before attaining legal age or marriage*, than to hold it up, *indefinitely, thereafter*. *If, thereafter*, they could, under *any* circumstances, *suspend* an allotment, the circumstances must be such as to render the division *more injurious* to the interests of the estate and family, *then*, than at a future period. *Ibid*.

11. If, under such Will, the Executors refuse to make an equal allotment to a devisee of full age or married, it may be made by commissioners appointed by, and acting under the control of a Court of Equity. *Ibid*.

12. Notwithstanding a paper purporting to be a will, be proved, in a suit in Chancery, to have been wholly written and subscribed by the supposed testator; yet if, upon the evidence, (there being no attesting witness,) it be *doubtful* whether, at the time he wrote it, he

was in a proper state of mind to make a testament; whether it was seriously intended by him as such; or, if so, whether it has not been subsequently nullified by the re-publication of a former Will, a revocation of it, or otherwise; the Court ought to direct *issues* to ascertain such facts before any decision of the cause. *Banks & others v. Booth*, p. 385-387.

13. A provision in a Will, that the money arising from the sale of the testator's personal property, *after payment of his just debts*, shall be applied to certain purposes, does not create a *trust* for the payment of the debts, nor take any debt out of the operation of the Act of limitations. *Brown's adm'r v. Griffiths*, p. 450-452.

14. A testator (whose Will was dated in 1804,) directed the residue of his estate to be kept together, until his son W. C. arrived to 21 years, and then that an equal division of all his personal property be made between his sons W. C. and D. C.; "and, if either of his said sons *died without lawful heir*, that the *surviving brother* should inherit all the *estate of the deceased*." This was a good limitation over, in favour of the survivor, upon the death of the other son without issue. *Cordle's adm'r. v. Cordle's ex'or*, p. 455-456.

WITNESSES.

1. Under what circumstances, a continuance ought to be granted, on the ground of the absence of witnesses; without positive proof that the subpoenas were *delivered* to the sheriff of the County, or sent to the sheriff of any other County. *Deford v. Hayes*, p. 390-391.

WRIT.

1. If the writ be in *covenant*, and the declaration in *debt*, to which the defendant pleads *covenant performed*; the writ (though not made part of the record by *oyer*) may be resorted to, at the trial, to shew the true date of the *institution* of the suit; and the Court may instruct the jury that a deed executed *after the date of the writ*, (though before the filing of the declaration,) is no performance of the condition of the bond declared upon. *Pate v. Spotts*, p. 394-397.

WRIT OF ENQUIRY.

1. A judgment at Rules in a clerk's office, can not lawfully be made *final*, on a declaration in debt, and not *alleged to be founded on any specialty, bill or note in writing*; until a writ of enquiry has been awarded and executed. *Bunt & others v. McRae*, p. 454-455.

